This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY

Received NOV 5 1915

WASHINGTON REPORTS

VOL. 84

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

FEBRUARY 1, 1915—APRIL 6, 1915

ARTHUR REMINGTON
REPORTER

SEATTLE AND SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1915

OFFICIAL REPORT

Published Pursuant to Laws of Washington, 1905, page 330
Under the personal supervision of the Reporter

NOV 5 1915

PRINTED, ELECTROTYPED AND BOUND
BY
FRANK M. LAMBORN, PUBLIC PRINTER

JUDGES

OF THE

SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

HON. GEORGE E. MORRIS, CHIEF JUSTICE

DEPARTMENT ONE

HON. WALLACE MOUNT

HON. STEPHEN J. CHADWICK

HON. EMMETT N. PARKER

HON. OSCAR R. HOLCOMB

DEPARTMENT TWO

HON. MARK A. FULLERTON

HON. HERMAN D. CROW

HON. OVERTON G. ELLIS

HON. JOHN F. MAIN

HON. W. V. TANNER, ATTORNEY GENERAL

C. S. REINHART, CLERK

JUDGES OF THE SUPERIOR COURTS

HON. BERT LINN.....Adams, Benton and Franklin
HON. CHESTER F. MILLER.....Asotin, Columbia and Garfield
HON. MASON IRWIN.....Chehalis
HON. BEN SHEEKS.....Chehalis
HON. WILLIAM A. GRIMSHAW.....Chelan
HON. JOHN M. RALSTON.....Clallam, Island and Jefferson
HON. R. H. BACK.....Clarke
HON. WILLIAM T. DARCH.....Cowlitz, Klickitat and Skamania
HON. R. S. STEINER.....Douglas and Grant
HON. E. K. PENDERGAST.....Ferry and Okanogan
HON. BOYD J. TALLMAN.....King
HON. ROBERT B. ALBERTSON.....King
HON. A. W. FRATER.....King
HON. MITCHELL GILLIAM.....King
HON. EVERETT SMITH.....King
HON. KENNETH MACKINTOSH.....King
HON. J. T. RONALD.....King
HON. KING DYKEMAN.....King
HON. JOHN E. HUMPHRIES.....King
HON. WALTER M. FRENCH.....Kitsap
HON. RALPH KAUFFMAN.....Kittitas
HON. ALONZO E. RICE.....Lewis
HON. JOSEPH SESSIONS.....Lincoln
HON. JOHN R. MITCHELL.....Mason and Thurston
HON. D. F. WRIGHT.....Mason and Thurston
HON. EDWARD H. WRIGHT.....Pacific and Wahkiakum
HON. W. H. JACKSON.....Pend Oreille and Stevens
HON. WILLIAM O. CHAPMAN.....Pierce
HON. M. L. CLIFFORD.....Pierce
HON. C. M. EASTERDAY.....Pierce
HON. ERNEST M. CARD.....Pierce
HON. AUGUSTUS BRAWLEY.....Skagit and San Juan
HON. GUY C. ALSTON.....Snohomish
HON. RALPH C. BELL.....Snohomish
HON. HENRY L. KENNAN.....Spokane
HON. WILLIAM A. HUNEKE.....Spokane
HON. E. H. SULLIVAN.....Spokane
HON. J. STANLEY WEBSTER.....Spokane
HON. BRUCE BLAKE.....Spokane
HON. EDWARD C. MILLS.....Walla Walla
HON. W. H. PEMBERTON.....Whatcom
HON. ED. E. HARDIN.....Whatcom
HON. R. L. MCCROSKEY.....Whitman
HON. E. B. PREBLE.....Yakima
HON. THOMAS E. GRADY.....Yakima

TABLE

OF

CASES REPORTED

	Page
Aberdeen, Aberdeen Construction Company v.	429
Aberdeen Construction Company v. Aberdeen	429
Anderson Steamboat Company v. King County	375
Assessment for Local Improvement Sewer District No. 1 of Chehalis, In re	565
Barnard v. Clarke	698
Bell, Boger v.	131
Bonner, Independent Order of Foresters v.	13
Bjornsen v. Northern Pacific Railway Company	220
Blomberg, Winton Motor Carriage Company v.	451
Bogart, Prentiss v.	481
Boger v. Bell	131
Book v. West	107
Booth, Lorenz v.	550
Bouckaert v. State Board of Land Commissioners	356
Boyce v. Campbell	64
Bradley v. Donovan-Pattison Realty Company	654
Briscoe v. Washington-Oregon Corporation	29
Brunn, Maser v.	699
Bunck v. McAulay	473
Calvin Phillips & Company v. Fishback	124
Campbell, Boyce v.	64
Carman v. Carman	402
Carstens & Earles v. Seattle	88
Carstens Packing Company v. Empire State Surety Company	545
Carstens Packing Company, Flessher v.	697
Chehalis, Schooley v.	667

Page

Chicago Milwaukee and Puget Sound Railway Company, Henry v. 633
Chicago Milwaukee & Puget Sound Railway Company, Orillia Lumber Company v. 362
Clarke, Barnard v. 698
Clausen, State ex rel. State Board of Medical Examiners v. 279
Clere Clothing Company, Spokane Merchants Association v. 616
Colby v. Keene 185
Connor, Lamb v. 121
Cook v. Washington-Oregon Corporation 68
Cosmopolis, Reynolds v. 660
Cowlitz County, Hammond Lumber Company v. 462

Dodd, State v. 436
Donovan-Pattison Realty Company, Bradley v. 654
Dopps, McLaughlin v. 442
Doust, Weber v. 330

Eastern Railway & Lumber Company, Miller v. 31
Eighme v. Holcomb 145
Empire State Surety Company, Carstens Packing Company v. 545

Faucett v. Northern Clay Company 382
Fidelity & Deposit Company, McGowan Brothers Hardware Company v. 470
Fishback, Calvin Phillips & Company v. 124
Flessher v. Carstens Packing Company 697
Foster, State ex rel. Puget Sound & Willapa Harbor Railway Company v. 75
Foster, State ex rel. Syverson v. 58
Frater, State ex rel. Vance v. 466

Gamer v. Schlentz 87
George, State v. 113
German-American Bank of Seattle, Thomson Estate v. .. 326

Page
Glenn v. Glenn 215
Great Northern Railway Company v. State 700
Guerrieri v. Industrial Insurance Commission 266

Hall, Heine v. 260
Hammond Lumber Company v. Cowlitz County 462
Hanes, State v. 601
Hart, Morgan v. 496
Hawkins, Union Central Life Insurance Company v. 605
Heine v. Hall 260
Henry v. Chicago, Milwaukee and Puget Sound Railway Company 633
Holcomb, Eighme v. 145
Hotel Commercial Company, Schroeder v. 685
How, Prentice v. 136
Hoxsey v. Murray 588
Huntley, Los Angeles Berry Growers' Co-Operative Association v. 155

Independent Order of Foresters v. Bonner 13
Industrial Insurance Commission, Guerrieri v. 266
In re Assessment for Local Improvement Sewer District No. 1 of Chehalis 565
In re Roberts' Estate 163
In re Welch's Estate 558

Jones v. Meares 228

Keene, Colby v. 185
Kieburtz v. Seattle 196
King County, Anderson Steamboat Company v. 375
Kingsley v. Standard Lumber Company 189
Kohler & Chase v. Turner 192
Krug v. Krug 696

Lamb v. Connor 121
Laughlin v. Seattle Taxicab & Transfer Company 342
Local Improvement Sewer District No. 1 of Chehalis, Assessment for, In re 565

Page

Lodge Room Company v. Pacific Bond & Investment Company 150
Lord v. Wapato Irrigation Company 696
Lorenz v. Booth 550
Los Angeles Berry Growers' Co-Operative Association v. Huntley 155
Loudon v. Spencer 286

McAulay, Bunck v 473
McConaghy, State v 168
McGilvra, State ex rel. Board of State Land Commissioners v. 487
McGowan Brothers Hardware Company v. Fidelity & Deposit Company of Maryland 470
McLaughlin v. Dopps 442
McReavy, Mason County v 9
Manheim v. Standard Fire Insurance Company 16
Martin v. Wilson 625
Maser v. Brunn 699
Mason County v. McReavy 9
Meares, Jones v 228
Meath, State ex rel. Brislawn v 302
Meisenheimer, Merritt v 174
Mendota Coal & Coke Company, Packwood v 47
Merritt v. Meisenheimer 174
Miller v. Eastern Railway & Lumber Company 31
Moore, State v 263
Morgan v. Hart 496
Mottman, Prince v 287
Murphy v. Summersett 565
Murray, Hoxsey v 588

Northern Clay Company, Faucett v 382
Northern Pacific Railway Company, Bjornsen v 220
Northern Pacific Railway Company v. State 510
Northern Pacific Railway Company v. Tillotson 678
Novak, Skansi v 39

Page

Olds Company, Young Men's Christian Association of Wenatchee v. ... 630
Olsen v. Smith ... 228
Orillia Lumber Company v. Chicago, Milwaukee & Puget Sound Railway Company ... 362
Orr Company, Smith v ... 561

Pacific Bond & Investment Company, Lodge Room Company v. ... 150
Packwood v. Mendota Coal & Coke Company ... 47
Paysse v. Paysse ... 351
Perrigo, Town of Redmond v ... 407
Phillips & Company v. Fishback ... 124
Prentice v. How ... 136
Prentiss v. Bogart ... 481
Preston, State ex rel. School District No. 301 of Whatcom County v ... 79
Preston, State ex rel. Seattle School District No. 1 v. . 697
Prince v. Mottman ... 287
Puget Sound Lumber Company, Yamamoto v ... 411

Ransom v. Wickstrom & Company ... 419
Redmond v. Perrigo ... 407
Replogle v. Seattle School District No. 1 ... 581
Reynolds v. Town of Cosmopolis ... 660
Roberts' Estate, In re ... 163
Robinson Company, State v ... 246
Rowan, State v ... 158
Russell, State v ... 607

Schirmer v. Schirmer ... 1
Schlentz, Gamer v ... 37
Schooley v. Chehalis ... 667
Schroeder v. Hotel Commercial Company ... 685
Seattle, Carstens & Earles v ... 88
Seattle, Kieburtz v ... 196
Seattle, Wagner v ... 275
Seattle School District No. 1, Replogle v ... 581

Page
Seattle Taxicab & Transfer Company, Laughlin v..... 342
Sefrit, State v..... 345
Skansi v. Novak..... 39
Smith, Olsen v..... 228
Smith v. Orr Company..... 561
Snyder, State v..... 485
Spencer, Loudon v..... 236
Spokane Merchants Association v. Clere Clothing Company 616
Standard Fire Insurance Company, Manheim v..... 16
Standard Lumber Company, Kingsley v..... 189
State v. Dodd 436
State v. George 113
State, Great Northern Railway Company v..... 700
State v. Hanes 601
State v. McConaghy 168
State v. Moore 263
State, Northern Pacific Railway Company v..... 510
State v. Robinson Company..... 246
State v. Rowan 158
State v. Russell 607
State v. Sefrit 345
State v. Snyder 485
State ex rel. Board of State Land Commissioners v. McGilvra 487
State ex rel. Brislawn v. Meath..... 302
State ex rel. Davis v. Superior Court, Cowlitz County.. 252
State ex rel. Jakubowski v. Superior Court, King County 663
State ex rel. Pacific Loan & Investment Company v. Superior Court, Kittitas County..... 392
State ex rel. Puget Sound & Willapa Harbor Railway Company v. Foster..... 75
State ex rel. School District No. 301 of Whatcom County v. Preston..... 79
State ex rel. Seattle School District No. 1 v. Preston... 697
State ex rel. State Board of Medical Examiners v. Clausen 279

Page

State ex rel. Syverson v. Foster 58
State ex rel. Union Trust & Savings Bank v. Superior Court, Spokane County 20
State ex rel. Vance v. Frater 466
State Board of Land Commissioners, Bouckaert v. 356
Summersett, Murphy v 565
Superior Court, State ex rel. Davis v. 252
Superior Court, State ex rel. Jakubowski v. 663
Superior Court, State ex rel. Pacific Loan & Investment Company v. 392
Superior Court, State ex rel. Union Trust & Savings Bank v. 20
Surry v. Surry 269

Thomson Estate v. German-American Bank of Seattle .. 326
Thomson Estate v. Washington Investment Company .. 326
Tillotson, Northern Pacific Railway Company v. 678
Town of Cosmopolis, Reynolds v 660
Town of Redmond v. Perrigo 407
Turner, Kohler & Chase v 192

Union Central Life Insurance Company v. Hawkins 605

Wagner v. Seattle 275
Walker, White v 652
Wapato Irrigation Company, Lord v 696
Washington Investment Company, Thomson Estate v .. 326
Washington-Oregon Corporation, Briscoe v 29
Washington-Oregon Corporation, Cook v 68
Weber v. Doust 330
Welch v. Welch 558
Welch's Estate, In re 558
West, Book v 107
White v. Walker 652
Wickstrom & Company, Ransom v 419
Willson v. Willson 240
Wilson, Martin v 625

Page
Winton Motor Carriage Company v. Blomberg..... 451
Worden v. Worden..... 614

Yamamoto v. Puget Sound Lumber Company..... 411
Young Men's Christian Association of Wenatchee v. Olds Company 630

TABLE

OF

CASES CITED BY THE COURT

			Page
Abrams v. Seattle & Montana R. Co.	27 Wash.	507	417
Abrams v. State	45 Wash.	327	144
Acres v. Frederick & Nelson	79 Wash.	402	584
Adeline G. Nott's Case	11 Fairfield (Me.)	208	334, 340
Ah Peen, Ex parte	51 Cal.	280	63, 334
Alaska Steamship Co. v. Pacific Coast Gypsum Co.	71 Wash.	359	431, 432, 433, 435
Allen v. Ruland	79 Conn.	405	426
American Bonding Co. v. Loeb	47 Wash.	447	695
American Loan & Trust Co. v. Olympia Light & Power Co.	72 Fed.	620	232
American Multigraph Sales Co. v. Jones	58 Wash.	619	73
American Sav. Bank & Trust Co. v. Helgesen	67 Wash.	572	423
Anderson v. Stadlmann	17 Wash.	433	666
Anshutz v. Louisville R. Co.	152 Ky.	741	596
Arkansas Tax Comm. v. Moore	103 Ark.	48	307, 324
Armour v. Seixas	80 Wash.	181	461
Armstrong v. Lisle	1 Salk.	60	118
Armstrong v. Yakima Hotel Co.	75 Wash.	477	598
Ashton v. Rochester	133 N. Y.	187	573, 575
Atchison, T. & S. F. R. Co. v. Baldwin	53 Colo.	416	641
Attorney General ex rel. Barbour v. Lindsay	178 Mich.	524	307, 314
Atwood v. Smith	64 Wash.	470	211
Ault v. Interstate Savings & Loan Ass'n	15 Wash.	627	182
Auwarter v. Kroll	79 Wash.	179	213, 414
Baird v. Grand Rapids School Furniture Co.	98 Mich.	457	195
Baker v. Yakima Valley Canal Co.	77 Wash.	70	344
Bane v. Seattle	80 Wash.	141	277
Barbier v. Connolly	113 U. S.	27	334
Bauman v. Ross	167 U. S.	548	98

			Page
Baxter v. Waite	2	Wash. Terr. 228	179, 182
Beard v. United States	158	U. S. 550	171
Beebe v. Beebe Co.	64	N. J. L. 497	457
Bennett Trust Co. v. Sengstacken	58	Ore. 333	307
Benney v. Clein	15	Wash. 581	424
Bergman Clay Mfg. Co. v. Bergman	73	Wash. 144	628
Bibbins v. Clark	90	Iowa 230	104
Bibbins v. Polk County	100	Iowa 493	104
Bickford v. Bickford	57	Wash. 639	6
Bigelow v. Morong	103	Mass. 287	167
Binns v. Emery	45	Wash. 215	595
Bishop of Bath's Case	6	Coke (K. B.) 34 b	391
Blake v. Shriver	27	Wash. 593	45
Bloomingdale v. Weil	29	Wash. 611	423
Blumauer v. Clock	24	Wash. 596	233
Bogle v. Devlin	81	Wash. 50	658
Bonds-Foster Lumber Co. v. Northern Pac. R. Co.	53	Wash. 302	371
Booker, Ex parte	18	Ark. 338	632
Boothe v. Summit Coal Min. Co.	55	Wash. 167	627
Borde v. Kingsley	76	Wash. 613	344
Bosman v. Davis	39	Iowa 308	142
Boston Clothing Co. v. Solberg	28	Wash. 262	390
Bouckaert v. State Board of Land Com'rs	84	Wash. 356	493
Bousman v. City of Stafford	71	Kan. 648	596
Bowling Coal Co. v. Ruffner	117	Tenn. 180	55
Bowman v. Humphrey	124	Iowa 744	55
Bradley Engineering & Mach. Co. v. Muzzy	54	Wash. 227	117
British & American Mtg. Co. v. Cody	135	Ala. 622	426
Brogna v. Brogna	67	Wash. 687	244
Brown v. New Jersey	175	U. S. 172	116
Brown v. Smedley	136	Mich. 70	457
Brown v. Walla Walla	76	Wash. 670	38, 213
Budlong v. Budlong	48	Wash. 645	122
Buffalo v. Delaware, L. & W. R. Co.	190	N. Y. 84	378
Buffalo Pitts Co. v. Shriner	41	Wash. 146	460
Burrows v. Gallup	32	Conn. 493	380
Camp, In re	38	Wash. 393	249
Campbell v. Jones	60	Wash. 265	684
Campion v. Kehoe	80	Wash. 627	606
Carlisle v. Chehalis County	32	Wash. 284	465
Carlisle Packing Co. v. Deming	62	Wash. 455	13
Carlson Bros. & Co. v. Van de Vanter	19	Wash. 32	651

				Page
Carmack v. Drum	32	Wash.	236	426
Carpenter v. Sherfey	71	Ill.	427	142
Carstens v. DeSellem	82	Wash.	643	158, 313
Carstens & Earles v. Leidigh & H. Lum. Co.	18	Wash.	450	623
Carstens Packing Co. v. Northern-ern Pac. R. Co.	64	Wash.	256	637, 645
Carstens Packing Co. v. Southern Pac. Co.	58	Wash.	239	637, 649
Casassa v. Seattle	75	Wash.	367	276
Cass v. Dicks	14	Wash.	75	35
Cawsey v. Brickey	82	Wash.	653	158
Cedar Rapids Nat. Bank v. Myhre Bros.	57	Wash.	596	447
Chapman v. Branch	72	W. Va.	54	297
Chapoton's Estate, In re	104	Mich.	11	167
Chase v. Knabel	46	Wash.	484	414
Chezum v. Claypool	22	Wash.	498	459
Chicago, B. & Q. R. Co. v. Babcock	204	U. S.	585	531
Chicago & N. W. R. Co. v. State	128	Wis.	553	531
Chilberg v. Smith	174	Fed.	805	73
City of Paterson v. O'Neill	32	N. J. Eq.	386	105
Clambey v. Copland	52	Wash.	580	71
Clark v. Cline	123	Ga.	856	83
Clarke v. Yukon Investment Co.	83	Wash.	485	154
Clegg v. St. Louis & S. F. R. Co.	203	Fed.	971	645, 649
Clute v. North Yakima & Valley R. Co.	62	Wash.	531	77
Cole v. Price	22	Wash.	18	627
Collins v. Hines	100	S. W. (Tex. C. A.)	359	458
Collins v. Spokane	64	Wash.	153	276
Columbus Varnish Co. v. Seattle Paint Co.	77	Wash.	245	658
Colvin v. Colvin	15	Wash.	490	6, 7
Coffer v. Erickson	61	Wash.	559	594, 595
Commercial Mut. Accident Co. v. Davis	213	U. S.	245	623
Commissioners Commercial Water-way Dist. No. 2 v. Seattle Factory Sites Co.	76	Wash.	181	96, 258
Commonwealth v. Alger	7	Cush.	53	311
Commonwealth v. Fisher	213	Pa.	48	335
Compton v. Hankins	90	Ala.	411	378
Cone v. Tuscaloosa Mfg. Co.	76	Fed.	891	623
Cook v. State	101	Ind.	446	104
Corcoran v. Chesapeake & Ohio Canal Co.	94	U. S.	741	506

			Page
County of McLean v. Humphreys	104	Ill. 378	334
County of St. Clair v. Lovingston	23	Wall. 46	257
Crabtree v. Potts	108	Ill. App. 627	694
Creditors Collection Association v. Bisbee	80	Wash. 358	219
Crouse, Ex parte	4	Whart. (Pa.) 9	334
Crouse v. Derbyshire	10	Mich. 479	457
Current v. Muir	99	Minn. 1	425
Curry, Estate of	39	Cal. 529	166
Dallas v. Hallock	44	Ore. 246	307
Dallemagne v. Moisan	197	U. S. 169	336
Dane v. Daniel	28	Wash. 155	401
Dawson v. McCarty	21	Wash. 314	424
Day v. Louisville Coal & Coke Co.	60	W. Va. 27	53
Dean v. Walla Walla	48	Wash. 75	677
Decan v. Shipper	35	Pa. St. 239	375
Decker v. Seattle	80	Wash. 137	277
Delacey v. Commercial Trust Co.	51	Wash. 542	46
Denk v. Fiel	249	Ill. 424	297
Detroit Citizens' St. R. Co. v. Common Council of Detroit	125	Mich. 673	531, 532
Dexter Horton & Co. v. Wiley	2	Wash. 171	74
Dickey v. Maddux	48	Wash. 411	35
Doe v. Tenino Coal & Iron Co.	43	Wash. 523	73
Doe d. Bailey v. Foster	15	L. J. C. P. 263	390
Doe d. King v. Grafton	18	Adol. & E. (N. S.) 495	389
Doe d. Shrewsbury v. Wilson	5	B. & Ald. 363	389
Dolan v. Cain	59	Wash. 259	651
Donovan v. Purtell	216	Ill. 629	623
Douglas v. Cameron	47	Neb. 358	167
Douglas v. Hanbury	56	Wash. 63	133
Douglass, Appeal of	118	Pa. 65	380
Douthitt v. MacCulsky	11	Wash. 601	695
Drake v. Lady Ensley Coal, I. & R. Co.	102	Ala. 501	55
Driver v. Galland	59	Wash. 201	624
Dunn v. Price	112	Cal. 46	426
Durham v. Spokane	27	Wash. 615	277
Dyer v. Dyer	65	Wash. 535	458
Eastman & Co. v. Watson	72	Wash. 522	422
Eaton v. Alger	2	Keyes (N. Y.) 41	426
Edison Elec. Ill. Co. v. Spokane County	22	Wash. 168	465
Eilers Music House v. Oriental Co.	69	Wash. 618	690
Eisenberg v. Nichols	22	Wash. 70	427

				Page
Electric Storage Battery Co. v. Waterloo, C. F. & N. R. Co.	138	Iowa	369	460
Ellis v. Ellis	77	Wash.	247	6, 7
El Reno v. Cleveland-Trinidad Paving Co.	25	Okl.	648	508
Elwood v. Stewart	5	Wash.	736	423
Embree v. McLennan	18	Wash.	651	93
Emery v. Pease	20	N. Y.	62	177
Enoch v. Spokane Falls & N. R. Co.	6	Wash.	393	410
Eureka District Gold Min. Co. v. Ferry County	28	Wash.	250	73
Exposition Amusement Co. v. Raeco Products Co.	55	Wash.	314	94
Farnham v. Pierce	141	Mass.	203	334, 336
Faulkner v. Seattle	19	Wash.	320	677
Feas' Estate, In re	30	Wash.	51	666
Ferguson-Hendrix Co. v. Fidelity & Dep. Co.	79	Wash.	528	128
Ferrier, Petition of	103	Ill.	367	334
Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.	58	Wash.	332	417
First Nat. Bank of Aberdeen v. Chehalis County	6	Wash.	64	541
First Nat. Bank of Chicago v. Trebein Co.	59	Ohio St.	316	623
First Nat. Bank of Everett v. Wilcox	72	Wash.	473	73
First Nat. Bank of Pullman v. Northern Pac. R. Co.	28	Wash.	439	363
Fishburne v. Robinson	49	Wash.	271	212, 213
Fitch v. Applegate	24	Wash.	25	234, 235
Fite v. Black	85	Ga.	413	273
Flessher v. Carstens Packing Co.	81	Wash.	241	697
Fontain v. Ravenel	17	How.	369	333
Frasier v. Cowlitz County	67	Wash.	312	277
Freebury v. Chicago, M. & P. S. R. Co.	77	Wash.	464	682
Freeman v. Gloyd	43	Wash.	607	694
Fuller v. Acker	1	Hill (N. Y.)	473	426
Fuller v. Chenault	157	Ala.	46	694
Furbush v. Goodwin	5	Foster (N. H.)	425	426
Garvey's Case	7	Colo.	384	118
Geer v. Redman	92	Mo.	375	188
Georgia R. & Banking Co. v. Wright	124	Ga.	596	508
Gilbert Co. v. Husted	50	Wash.	61	194, 195

				Page
Giles v. Atchison, T. & S. F. R. Co.	92	Kan.	322	639
Gilmore v. Seattle & Renton R. Co.	29	Wash.	150	418
Glidden & Joy Varnish Co. v. Interstate Nat. Bank	69	Fed.	912	623
Goetter v. Moore	53	Wash.	5	143, 144
Goodno v. Oshkosh	31	Wis.	127	676
Gould v. Austin	52	Wash.	457	71
Gould v. Knox	53	Wash.	248	133
Grant v. Walsh	36	Wash.	190	414
Gray v. Brignardello	1	Wall.	627	299
Great Northern R. Co. v. Snohomish County	48	Wash.	478	86, 531
Great Northern R. Co. v. Snohomish County	54	Wash.	23	86, 531
Greene v. Nunnemacher	36	Wis.	50	55
Gregory v. Ford	14	Cal.	138	402
Griffith v. Maxwell	20	Wash.	403	93
Gulf, Colorado & S. F. R. Co. v. Trawick	68	Tex.	314	642
Gust v. Gust	78	Wash.	414	244
Guthrie Nat. Bank v. Guthrie	173	U. S.	528	316, 317
Hacker v. White	22	Wash.	415	423
Hall v. Hinks	21	Md.	406	368
Hallidie Mach. Co. v. Whidbey Island Sand & Gravel Co.	62	Wash.	604	461
Hammock v. Tacoma	40	Wash.	539	277
Hankinson v. Riker	30	N. Y. Supp.	1040	425
Hanlon v. Hanlon	24	Colo.	284	256
Hansard v. Green	54	Wash.	161	674, 675
Hansford v. Tate	61	W. Va.	207	299
Harbican v. Chamberlin	82	Wash.	556	606
Hardman Estate v. McNair	61	Wash.	74	328, 595
Harniska v. Dolph	133	Fed.	158	457
Harp v. State	59	Ark.	113	115
Harris v. Johnson	75	Wash.	291	122
Harris v. Seattle, Renton & S. R. Co.	65	Wash.	27	689
Harrison v. Birrell	58	Ore.	410	122
Harvey v. Northern Pac. R. Co.	63	Wash.	669	34
Hastie v. Jenkins	53	Wash.	21	34
Hawkins v. Reber	81	Wash.	79	509
Hayton v. Seattle Brewing & Malting Co.	66	Wash.	248	154
Hayward v. Mason	54	Wash.	653	34, 35
Heal v. Evans Creek Coal & Coke Co.	71	Wash.	225	232
Heath v. McCrea	20	Wash.	342	464

				Page
Hesser v. Siepmann	35	Wash.	14	44, 45
Hillyard v. Board of County Com'rs	69	Wash.	423	92
Hirschorn v. Canney	98	Mass.	149	363, 373
Hoar v. Ward	47	Vt.	657	354
Hoffman v. Watkins	78	Wash.	118	556
Hofstetter v. Sound Trustee Co.	67	Wash.	537	651
Hooven & Allison Co. v. Wirtz	15	N. D.	477	460
Horner v. Leeds	25	N. J. L.	106	391
Horton v. Seattle	53	Wash.	316	276
House of Refuge v. Ryan	37	Ohio	197	334
Huetter v. Warehouse & Realty Co.	81	Wash.	331	434
Humphries v. Sorenson	33	Wash.	563	457
Hunt v. Allison	77	Wash.	58	479, 480
Hunt v. Wayne Circuit Judges	142	Mich.	93	334
Hutchinson v. Valdosta	227	U. S.	303	334
Iglehart v. Holt	12	App. D. C.	68	167
Imeson v. Tacoma R. & P. Co.	42	Wash.	74	413
Indianapolis, D. & W. R. Co. v. Sands	133	Ind.	433	457
Interstate Life Assurance Co. v. Dalton	165	Fed.	176	128
Iverson v. Bradrick	54	Wash.	633	94
Izett v. Stetson & Post Mill Co.	22	Wash.	300	367
Johnson v. Bartlett	50	Wash.	114	143, 301
Johnson v. Conner	48	Wash.	431	46, 47
Johnson v. Ingram	63	Wash.	554	44
Johnson v. Irwin	16	Wash.	652	92
Johnsen v. Johnsen	78	Wash.	423	344
Johnson v. Johnson	66	Wash.	113	301
Johnson v. McNabb	7	Ind. App.	393	334
Johnson v. Woodworth	18	Wash.	243	112
Kadderly v. Portland	44	Ore.	118	307, 311, 314, 319, 324
Kalama Elec. L. & P. Co. v. Kalama Driving Co.	48	Wash.	612	255
Kalina v. Union Pac. R. Co.	69	Kan.	172	648
Keene v. Behan	40	Wash.	505	447
Keene v. Zindorf	81	Wash.	152	133
Keith v. Rose	59	Wash.	197	400, 401
Kel, In re	10	N. D.	493	334
Kelley, In re	152	Mass.	432	334, 336
Kelly v. Lum	75	Wash.	135	71
Kendall v. Johnson	51	Wash.	477	683
Kennedy v. Meara	127	Ga.	68	335, 336
Key v. National Life Ins. Co.	107	Iowa	446	128
Kibbe v. Benson	17	Wall.	624	398

			Page
Kibler v. Maryland Casualty Co....	74	Wash. 159.....	695
Kidwell v. Oregon Short Line R. Co..	208	Fed. 1.....645,	649
Kitsap County v. Melker.....	52	Wash. 49.....	410
Knapp v. Chehalis.....	65	Wash. 350.....	595
Knowles v. Temple.....	49	Wash. 595.....94,	95
Knox v. Fuller.....	23	Wash. 34.....	367
Kohlheimer v. State.....	39	Miss. 548.....	118
Krug v. Krug.....	81	Wash. 461.....	696
Laumeier v. Dolph.....	145	Mo. App. 78.....	694
Lebovitz v. Cogswell.....	83	Wash. 174.....413,	414
Lee v. Wrixon.....	37	Wash. 47.....	428
Lentz v. Carnegie Bros. & Co.....	145	Pa. St. 612.....	56
Linbeck v. State.....	1	Wash. 336.....603,	604
Lindblom v. Mayar.....	81	Wash. 350.....	649
Lindquist v. Seattle.....	67	Wash. 230.....	277
Lindsay v. Lindsay.....	257	Ill. 328.....64, 335,	339
Liquid Carbonic Co. v. Norfolk & W. R. Co.....	107	Va. 323.....	642
Livieratos v. Commonwealth Security Co.	57	Wash. 376.....	133
Livingston v. Noe.....	69	Tenn. 55.....	299
Lockwood v. Thorn.....	18	N. Y. 285.....	180
Lohse v. Burch.....	42	Wash. 156.....	45
Lord v. Wapato Irrigation Co.....	81	Wash. 561.....	696
Louis v. Brown Township.....	109	U. S. 162.....	508
Lowell v. Boston & L. R. Corporation	23	Pick. 24.....	433
Lundy, In re.....	82	Wash. 148.....	331
Lybas v. Town of Ft. Myers.....	56	Fla. 817.....	103
McCarthy v. Hinman.....	35	Conn. 538.....	334
McClure v. Nye.....	22	Cal. App. 248.....307,	316
McCormick v. Sorenson.....	58	Wash. 107.....	47
McCormick Harvesting Mach. Co. v. Dodkins	24	Ky. Law 2306.....	694
McDougall v. McDougall.....	5	Wash. 802.....	6
McEvoy v. Taylor.....	56	Wash. 357.....	51
McHugh v. Conner.....	68	Wash. 229.....	301
McIver v. Williamson-Halsell-Frazier Co.	19	Okl. 454.....	364
McKenzie v. Poorman Silver Mines of Colorado	88	Fed. 111.....	177
McKilver v. Manchester.....	1	Wash. T. 255.....	595
McManamon v. Tobiason.....	75	Wash. 46.....153,	154
McMaster v. President etc. of Insurance Co. of North America.....	55	N. Y. 222.....	426
McMaster v. State.....	108	N. Y. 542.....208,	211

			Page
McNaught-Collins Imp. Co. v. May.	52	Wash.	632.....45, 46
M'Queen v. M'Queen.....	9	U. C. Q. B.	536..... 389
McReavy v. Eshelman.....	4	Wash.	757..... 563
Mahncke v. Mahncke.....	42	Wash.	425..... 615
Mallory v. Olympia.....	82	Wash.	499..... 580
Manley v. Johnson.....	85	Vt.	262..... 457
Marbury v. Madison.....	1	Cranch (U. S.)	49..... 308
Marquis v. Davis.....113		Ind.	219..... 299
Martin v. Evans.....	85	Md.	8..... 509
Martyn v. Arnold & Co.....	36	Fla.	446..... 182
Meacham v. Seattle.....	69	Wash.	238..... 211
Menefee, In re.....	22	Okl.	365..... 307
Merrifield v. Lombard.....	13	Allen	16..... 53
Michigan Central R. Co. v. Phillips.	60	Ill.	190..... 368
Miedreich v. Lauenstein.....232		U. S.	236..... 402
Milbank v. Rowland.....	63	Wash.	519..... 45
Mill v. Brown.....	31	Utah	473.....63, 335
Miller v. Anderson.....	1	S. D.	539..... 104
Miller v. Pierce County.....	34	Wash.	592..... 12
Miller & Lux v. Madera Canal & Irr. Co. 155		Cal.	59..... 34
Mills v. St. Clair County.....	8	How.	569..... 380
Milwaukee Industrial School v. Supervisors of Milwaukee County..	40	Wis.	328.....334, 336
Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.....	55	Minn.	286..... 425
Missouri, K. & T. R. Co. v. Harriman 227		U. S.	657.....643, 645
Montgomery Web Co. v. Dienelt....133		Pa. St.	585..... 623
Moore v. Brownfield.....	7	Wash.	28..... 46
Morey v. Duluth.....	75	Minn.	221..... 99
Morse v. O'Connell.....	7	Wash.	117..... 360
Mount v. Commonwealth.....	2	Duvall (Ky.)	93..... 118
Moyer v. Peabody.....212		U. S.	78..... 332
Mueller v. Vancouver.....	81	Wash.	384..... 344
Mugler v. Kansas.....123		U. S.	623..... 313
Muncie Pulp Co., In re.....139		Fed.	546..... 623
Murphy v. Massachusetts.....177		U. S.	155..... 119
Murray v. Meade.....	5	Wash.	693..... 415
Murray's Lessee v. Hoboken Land & Imp. Co.....	18	How. (U. S.)	272..... 338
Naher v. Farmer.....	60	Wash.	600..... 47
National Bank of Bristol v. B. & O. R. Co.	99	Md.	661..... 369
Neitzel v. Spokane International R. Co.	80	Wash.	30.....26, 27
Nelson v. Denny.....	26	Wash.	327..... 397

			Page
Nelson v. Walker	78	Wash. 353	658
Newcomb, In re	56	Wash. 395	62
Newell v. Loeb	77	Wash. 182	27, 257
Nichols v. Capen	79	Wash. 120	606
Nichols, Ex parte	110	Cal. 651	335
Nicomen Boom Co. v. North Shore B. & D. Co.	40	Wash. 315	26
Noble v. Whitten	34	Wash. 507	93
Noland v. Great Northern R. Co.	31	Wash. 430	417
North Bend Lumber Co. v. Chicago, M. & P. S. R. Co.	76	Wash. 232	682, 684
North Coast R. Co. v. Northern Pac. R. Co.	48	Wash. 529	28
Northern Pac. R. Co. v. State	84	Wash. 510	700
North Star Trad. Co. v. A.-Y.-P. Exp.	63	Wash. 376	422
North Star Trad. Co. v. A.-Y.-P. Exp.	68	Wash. 457	422
Nutt v. Davison	54	Colo. 586	191
O'Daniel v. Streeby	77	Wash. 414	624
Oklahoma City v. Shields	22	Okl. 265	307, 314, 324
Olson v. Howard	38	Wash. 15	143
Orillia L. Co. v. Chicago, M. & P. S. R. Co.	81	Wash. 611	363, 373
Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan	34	Wash. 216	92
Pacific Coast Biscuit Co. v. Perry	77	Wash. 352	231
Packenham v. Reed	37	Wash. 258	62, 64
Paddock v. Bartlett	68	Iowa 16	632
Parker v. Dacres	1	Wash. 190	301
Patterson v. Edmonds	72	Wash. 88	674
Patterson v. Wenatchee Canning Co.	53	Wash. 155	191
Peck v. Peck	76	Wash. 548	180
Peet v. Mills	76	Wash. 437	585
Pennsylvania Coal Co. v. Sanderson	113	Pa. St. 126	55
People v. Formosa	131	N. Y. 478	128
People v. McNealy	17	Cal. 333	120
People v. Supervisors	67	N. Y. 109	676
People v. Wilmarding	136	N. Y. 363	676
People ex rel. Trustees of School Dist. No. 25 v. Board of Town Auditors	126	N. Y. 528	83
People ex rel. Van Heck v. New York Catholic Protectory	101	N. Y. 195	335
Perkins v. Bakrow	45	Mo. App. 248	632
Peterson v. Wells	41	Wash. 693	556, 557
Peterson v. Woolery	9	Wash. 390	461

				Page
Phelan v. Smith	22	Wash.	397	94, 95
Philadelphia Mtg. & Trust Co. v. Palmer	32	Wash.	455	143
Pierce v. Aetna Life Ins. Co.	131	Ind.	284	104
Pierce v. Pierce	68	Wash.	415	6
Pierce County v. Bunch	49	Wash.	599	292
Pilling v. Everett	67	Wash.	109	674
Pine Street Assessment, In re	83	Wash.	281	96
Plummer v. Park	62	Neb.	665	458
Port v. Parfit	4	Wash.	369	457
Port Townsend v. Lewis	34	Wash.	413	45
Potter v. Spokane	63	Wash.	267	435
Potvin v. Blasher	9	Wash.	460	71
Powell, In re	6	Okl. Cr.	495	63, 335
Powell v. Powell	66	Wash.	561	244
Premo Specialty Mfg. Co. v. Jersey-Creme Co.	200	Fed.	352	623
Presbyterian Church of Albany v. Cooper	112	N. Y.	517	631
Prescott v. State	19	Ohio St.	184	334, 336
Prince v. Prince	64	Wash.	552	289, 290, 293, 294
Pritchett v. State	2	Sneed (34 Tenn.)	285	118
Puget Sound Nat. Bank of Seattle v. Seattle	9	Wash.	608	541
Quinby v. Higgins	14	Me.	309	167
Ramsey v. Wilson	52	Wash.	111	45, 46
Raymond v. Chicago Union Traction Co.	207	U. S.	20	540
Redding v. Anderson	37	Wash.	209	627
Reetz v. Michigan	188	U. S.	505	338
Regina v. Goddard	4	Ld. Raymond	920	118
Reynolds v. Howe	51	Conn.	472	63, 334
Rhea v. Shields	103	Va.	305	299
Richardson v. Langridge	4	Taunt.	128	390
Richmond v. Tacoma R. & P. Co.	67	Wash.	444	447, 448
Rieffin v. Grafton	63	Wash.	387	657, 658
Rieger, Kapner & Altmark, In re	157	Fed.	609	623
Riley v. Carico	27	Okl.	33	307, 314
Ritchie v. State	42	Wash.	653	286
Roberts v. Seattle	63	Wash.	573	27
Robinson v. Thoma	30	Wash.	129	133
Robinson v. Wayne Circuit Judges	151	Mich.	315	335
Rockwell v. Eiler's Music House	67	Wash.	478	153
Rodda v. Needham	78	Wash.	636	133
Roe v. Standard Furniture Co.	41	Wash.	546	212

				Page
Rohrer v. Snyder	29	Wash.	199	428
Romney v. United States	136	U. S.	1	333
Rork v. Smith	55	Wis.	67	572
Ross v. Howard	25	Wash.	1	666
Rothchild Brothers v. Mahoney	51	Wash.	633	422
Roy v. Griffin	26	Wash.	106	367
Rumpf v. Barto	10	Wash.	382	372
Sackman v. Thomas	24	Wash.	660	486
St. Louis, L. B. B. Co. v. Colorado Nat. Bank	8	Colo.	70	177
St. Louis, I. M. & S. R. Co. v. McWhirter	229	U. S.	265	226
Sall, In re	59	Wash.	539	334
Samish River Boom Co. v. Union Boom Co.	32	Wash.	586	25, 26
San Francisco Sav. Union v. Irwin	28	Fed.	708	35
Sarginson v. Turner Inv. Co.	69	Wash.	234	548
Savage v. Jones	225	U. S.	501	250
Sawdey v. Spokane Falls & N. R. Co.	30	Wash.	349	555-557
Sayre v. Burdick	47	Minn.	367	425
Scandinavian American Bank v. Johnston	63	Wash.	187	447, 448
Schaad v. Robinson	59	Wash.	346	188
Schade Brewing Co. v. Chicago, M. & P. S. R. Co.	79	Wash.	651	683
Scheller v. Pierce County	55	Wash.	298	45
Schneider v. Kirkpatrick	80	Mo. App.	145	425
School District No. 2 of Multnomah County v. Lambert	28	Ore.	209	83
Schultz v. Plankinton Bank	141	Ill.	116	425
Schurmeier v. St. Paul etc. Co.	10	Minn.	82	256
Schweig v. Chicago, M. & St. P. R. Co.	216	Fed.	750	227
Scott v. Hanford	37	Wash.	5	401
Scott v. McGraw	3	Wash.	675	423
Sears v. Multnomah County	49	Ore.	42	307
Seattle v. Dencker	58	Wash.	501	250
Seattle v. Hill	14	Wash.	487	94, 95, 96
Security State Bank v. O'Connell Lumber Co.	64	Wash.	506	371
Seitz v. Brewers' Refrigerating Co.	141	U. S.	510	460
Selchow v. Stymus	26	Hun.	145	125
Sharp, In re	15	Idaho	120	63, 335
Shaw v. Lobe	58	Wash.	219	178, 179, 182
Shaw v. Railroad Co.	101	U. S.	557	375

		Page
Shaw & Hodgins v. Waldron	55 Wash. 271	575
Sherman v. Sweeny	29 Wash. 321	239
Shigeta v. Gaffney Investment Co.	72 Wash. 221	328
Shoemake v. Finlayson	22 Wash. 12	695
Shoemaker v. State	58 Tex. Cr. 518	115
Shorett v. Knudsen	74 Wash. 448	133
Shorett v. Signor	58 Wash. 89	112
Sigafus v. Porter	84 Fed. 430	426
Simpson Logging Co. v. Chehalis County	80 Wash. 245	544
Singly v. Warren	18 Wash. 434	295, 296
Sipes v. Puget Sound Elec. R. Co.	50 Wash. 585	94
Sleeper v. Bragdon	45 Wash. 562	134
Sligh v. Shelton Southwestern R. Co.	20 Wash. 16	93
Slyfield v. Willard	43 Wash. 179	71
Smith v. Bolster	70 Wash. 1	691
Smith v. St. Paul, Minn. & M. R. Co.	39 Wash. 355	77
Smith v. Stiles	68 Wash. 345	458
Smith Meat Co. v. Oregon R. & Nav. Co.	59 Ore. 206	639
Smith Sand & Gravel Co. v. Corbin	75 Wash. 635	460
Snell v. Stelling	83 Wash. 248	44
Snow v. Parsons	28 Vt. 459	52
Soderberg v. McRae	67 Wash. 104	94
Southern Express Co. v. Caldwell	88 U. S. 264	640
Southern Express Co. v. Hunnicutt	54 Miss. 566	642
Spokane v. Macho	51 Wash. 322	249
Spokane v. Merriam	80 Wash. 222	26, 27
Spokane v. Pittsburg Land & Imp. Co.	73 Wash. 693	96
Spokane Grain Co. v. Great Northern Express Co.	55 Wash. 545	212
Spokane & I. E. R. Co. v. Spokane County	75 Wash. 72	530, 537, 539
Spokane & I. E. R. Co. v. Spokane County	82 Wash. 24	543
Stallcup v. Tacoma	13 Wash. 141	571
Stanley v. Stanley	24 Wash. 460	6
State v. Austin	113 Mo. 538	161
— v. Barker	37 Utah 345	35
— v. Bennett	71 Wash. 673	604
— v. Brown	50 Minn. 353	335
— v. Burke	73 N. C. 83	161
— v. Burns	54 Wash. 113	115
— v. Crotts	22 Wash. 245	604
— v. Dengel	24 Wash. 49	161
— v. Douette	31 Wash. 6	604

			Page
State v. Dunn	53	Ore. 304	335
— v. Dye	81	Wash. 388	120
— v. Eisen	53	Ore. 297	335
— v. George	79	Wash. 262	114
— v. Harsted	66	Wash. 158	173
— v. Hatch	63	Wash. 617	161
— v. Hewitt Land Co.	74	Wash. 573	117
— v. Johnson	19	Wash. 410	161
— v. Kinghorn	56	Wash. 131	115
— v. Kruger	60	Wash. 542	173
— v. La Chall	28	Utah 80	161
— v. Loehr	93	Mo. 103	161
— v. McPhail	39	Wash. 199	173
— v. Miller	80	Wash. 487	93
— v. Morgan	31	Wash. 226	161
— v. Myers	8	Wash. 177	604
— v. Nelson	39	Wash. 221	486
— v. Perley	86	Me. 427	161
— v. Riley	36	Wash. 441	114
— v. Rose	106	N. E. (Ohio St.) 50	61
— v. Seattle	57	Wash. 602	78
— v. Sturtevant	76	Wash. 158	46
— v. Tugwell	19	Wash. 238	350
— v. Ward	48	Ark. 36	115
— v. Western Union Tel. Co.	96	Minn. 13	531
— v. Whitney	66	Wash. 473	117
State ex rel. Alexander v. Sup'r Ct.	42	Wash. 684	666
— Arnold v. Mitchell	55	Wash. 513	117
— Atkinson v. World Real Estate Commercial Co.	46	Wash. 104	144
— Bethell v. Kilvington	100	Tenn. 227	335
— Boyle v. Sup'r Ct.	19	Wash. 128	397, 401
— Caillouet v. Marmouget	111	La. 225	63, 335
— Campbell v. Sup'r Ct.	25	Wash. 271	92
— Case v. Sup'r Ct.	81	Wash. 623	86
— Davis-Smith Co. v. Clausen	65	Wash. 156	310
— Dorrien v. Hazeltine	82	Wash. 81	349
— Dutch Miller Min. etc. Co. v. Sup'r Ct.	30	Wash. 43	458
— Ely v. Aetna Life Ins. Co.	117	Ind. 251	104
— Forgues v. Sup'r Ct.	70	Wash. 670	571
— Harbor Boom Co. v. Sup'r Ct.	65	Wash. 129	25
— Harris v. Sup'r Ct.	34	Wash. 248	397
— Jones v. Clausen	78	Wash. 103	117
— Jones v. Sup'r Ct.	44	Wash. 476	409
— Langley v. Sup'r Ct.	73	Wash. 110	402

			Page
State ex rel. Lavin v. Bacon	14	S. D. 394	307, 324
— Lindsey v. Derbyshire	79	Wash. 227	467
— Lowary v. Sup'r Ct.	41	Wash. 450	666
— Luria v. Wagener	69	Minn. 206	249
— McDonald v. Sup'r Ct.	6	Wash. 112	273
— Milwaukee Terminal R. Co. v. Sup'r Ct.	54	Wash. 365	28
— Morton v. Back	72	Neb. 402	531
— Murphy v. Coleman	71	Wash. 15	569, 578
— Murphy v. Wright	76	Wash. 383	576
— Notal v. Davey	37	La. Ann. 827	273
— Oregon R. & Nav. Co. v. Clausen	63	Wash. 535	530, 539
— Oregon R. & Nav. Co. v. Railroad Commission	52	Wash. 17	319
— Randolph County v. Evans	240	Mo. 95	83
— Schloss v. Sup'r Ct.	3	Wash. 696	273
— Schmidt v. Sup'r Ct.	62	Wash. 556	509
— School District No. 301 v. Preston	84	Wash. 79	698
— Skamania Boom Co. v. Sup'r Ct.	47	Wash. 166	25
— Spokane Falls & N. R. Co. v. Sup'r Ct.	40	Wash. 389	26
— Surry v. Sup'r Ct.	74	Wash. 689	270, 273
— Syverson v. Foster	84	Wash. 58	331
— Tanner v. Cheetham	23	Wash. 666	83
— Tumwater Power & Water Co. v. Sup'r Ct.	56	Wash. 287	666
— Twigg v. Sup'r Ct.	34	Wash. 643	397
— Wauconda Inv. Co. v. Sup'r Ct.	68	Wash. 660	379
— Weyerhaeuser Timber Co. v. Sup'r Ct.	71	Wash. 84	27
State Railroad Tax Cases	92	U. S. 575	531
Stetson v. Seattle	74	Wash. 606	318
Stofferan v. Okanogan County	76	Wash. 265	11
Strobel v. Kerr Salt Co.	164	N. Y. 303	55
Strong v. Eldridge	8	Wash. 595	632
Sudden & Christenson v. Morse	48	Wash. 101	94
Sullivan v. Sullivan	52	Wash. 160	244
Surry v. Surry	78	Wash. 370	270, 272
Tacoma v. Nisqually Power Co.	57	Wash. 420	27
Tatum v. Geist	40	Wash. 575	93
Taylor v. Ewing	74	Wash. 214	239
Tennessee Coal, Iron & R. Co. v. Herndon	100	Ala. 252	55

				Page
Tetherington v. Donk Bros. Coal & Coke Co.	232	Ill.	522	55
Third, Fourth, and Fifth Avenues, In re	47	Wash.	109	96
Thompson v. Rhodehamel	71	Wash.	24	694
Thompson Co. v. Murphine	79	Wash.	672	658
Tufts v. State	41	Fla.	663	115
Tugman v. Chicago	78	Ill.	405	250
Turner v. Parker	14	Ore.	340	256
Twigg v. James	37	Wash.	434	401
Union Inv. Co. v. Rosenzweig	79	Wash.	112	447, 448, 449
Union Iron Works v. Strauser	82	Wash.	51	471, 472, 473
United States v. Gibert	2	Sumner (U. S.)	19	118
Urquhart v. Coss	60	Wash.	249	232
Van Alstine Estate, In re	26	Utah	193	486
Vancouver Water Works Co. v. Clarke County	55	Wash.	112	465
Van Walters v. Board of Children's Guardians of Marion County	132	Ind.	567	334
Vaux, Case of	4	Coke	40-47	118, 119
Viereck v. Sullivan	77	Wash.	313	331
Von Tobel v. Stetson & Post Mill Co.	32	Wash.	683	414
Wabash Eastern R. Co. v. Commissioners of East Lake Fork Special Drainage Dist.	134	Ill.	384	101
Wagner v. Northern Life Ins. Co.	75	Wash.	106	213
Waldo v. Waldo	52	Mich.	91	506
Waldrip v. Hill	70	Wash.	187	239
Wall, Ex parte	107	U. S.	265	332
Wardell v. Commercial Waterway District No. 1	80	Wash.	495	256
Wares, In re	161	Mass.	70	334
Washington-Oregon Corporation v. Chehalis	76	Wash.	442	668, 676
Washburn v. Washburn Waterworks Co.	120	Wis.	575	533
Watkins v. Dorris	24	Wash.	636	255
Watson, In re	157	N. C.	340	63, 335
Way v. Pacific Lumber & T. Co.	74	Wash.	332	128
Weber v. Doust	81	Wash.	668	331, 339
Weber v. Doust	84	Wash.	330	63
Weems Steamboat Co. v. People's Steamboat Co.	214	U. S.	345	382
Weinberg v. Naher	51	Wash.	591	133

			Page
Wells, In re	60	Wash. 518	595
Wells, Fargo & Co.'s Express v. Crawford County	63	Ark. 576	531
Westminister, The	127	Fed. 680	647
Wheeler v. Wheeler	38	Wash. 491	6
Wheeler, Osgood Co. v. Fidelity & Deposit Co.	78	Wash. 328	471, 473
Whipple v. Lee	46	Wash. 266	628
White Crest Canning Co. v. Sims	30	Wash. 374	71
Whitman Agricultural Co. v. Strand	8	Wash. 647	366, 367
Whitsell v. Hill	101	Iowa 629	556
Wigton v. Bowley	139	Mass. 252	367
Wilcox v. Smith	38	Wash. 585	45
Wilkeson v. Board of Children's Guardians of Marion County	158	Ind. 388	335
Willamette Casket Co. v. Cross Undertaking Co.	12	Wash. 190	231
Williams v. State	34	Tex. Cr. 523	161
Williams v. State	10	Tex. App. 8	161
Wilson v. Fraser	67	Wash. 347	92
Winston v. Spokane	12	Wash. 524	677
Wintermute v. Tacoma Light & Water Co.	3	Wash. 727	360
Wisconsin Industrial School for Girls v. Clark County	103	Wis. 651	336
Wiss v. Stewart	16	Wash. 376	666
Wissinger v. Reed	69	Wash. 684	47
Wodock v. Robinson	148	Pa. St. 503	425
Wood v. People	53	N. Y. 511	161
Wood v. Tacoma	66	Wash. 266	34
Wood Mowing & Reaping Mach. Co. v. Calvert	89	Wis. 640	694
Woodhurst v. Cramer	29	Wash. 40	423
Worley v. Metropolitan Motor Car Co.	72	Wash. 243	73, 427
Wurdemann v. Barnes	92	Wis. 206	556
Yeisley v. Smith	82	Wash. 693	71
Yesler Estate v. Holmes	39	Wash. 34	45, 46
Young v. State	19	Wash. 634	286
Young & Co. v. Bankier Distillery Co.		A. C. 691 (Eng.) 1893	55
Zizich v. Holman Security Inv. Co.	77	Wash. 392	344

STATUTES

CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.

Page

Art. 1..... 62
" 1 § 12..... 247
" 1 § 13..... 62
" 1 § 17..... 60
" 1 §§ 20, 22..... 62
" 2 § 1.....309, 323
" 2 § 31.....305-310
" 2 § 33..... 143
" 7.....536, 538
" 7 § 3..... 539
" 8 § 6..... 673
" 17 § 1.....255, 381

CODE OF 1881.

Section 768..... 116

BALLINGER'S CODE.

Sections 1656, 1698..... 73

REMINGTON AND BALLINGER'S CODE.

Section 156..... 44
" 191..... 414
" 226.....397, 623
" 259..... 122
" 303..... 400
" 362, 364..... 413
" 464.....399, 400
" 516..... 60
" 529..... 666
" 573.....421, 699
" 582..... 300
" 749..... 60
" 786, 788..... 44
" 864..... 300

REMINGTON AND BALLINGER'S CODE—*Continued.*

Page

Section 921..... 409
" 925..... 25
" 936..... 409
" 989..... 4
" 1027..... 273
" 1075..... 62
" 1077..... 63
" 1132.....233, 234, 657
" 1147..... 657
" 1149.....69, 72, 233, 234
" 1149-1153.....230-232
" 1150.....70, 230, 232
" 1159-1161..... 545
" 1161.....470, 547
" 1211..... 653
" 1214..... 486
" 1254..... 162
" 1328..... 165
" 1341.....164, 165, 167
" 1718.....93, 94
" 1719..... 458
" 1720.....93, 94
" 1721..... 262
" 1735..... 93
" 1742.....294, 302
" 1749.....120, 121
" 1991..... 330
" 2057..... 441
" 2059..... 439
" 2109..... 114
" 2113.....115, 116, 117
" 2148..... 603
" 2286..... 162
" 2303..... 484

REMINGTON AND BALLINGER'S CODE—*Continued.*

	Page
Section 2304	116, 117
" 2316, 2353	116
" 2413, 2414, 2415	172
" 2418	160
" 2440	439, 602, 603
" 2601	483, 484, 607, 612
" 2602	612
" 2605	483
" 3095	156
" 3096	157
" 3450	447
" 3660	230, 232
" 3670	73, 427
" 3715	422
" 4091	253
" 4303	83
" 4412	85
" 4472, 4475	84
" 4509	85
" 4563	82
" 5013	377
" 5225	346, 347
" 6011	247, 248, 251
" 6011-6014	247
" 6015-6022	248
" 6022	248-250
" 6605	109, 304, 323
" 6616	494
" 6746	381
" 6750	109-112
" 6751	495
" 6751-6753	490-492, 494
" 7460	260
" 7767	90, 409
" 7768	408, 409
" 7772, 7792	96
" 7787-7813	98
" 7995	276
" 7802	90
" 8007	674
" 8008	675, 677
" 8114	378
" 8386	283
" 9092	73

REMINGTON AND BALLINGER'S CODE—*Continued.*

	Page
Section 9102	465, 528, 537
" 9112	73, 528, 536
" 9141	517, 529
" 9148	529, 530

3 REMINGTON AND BALLINGER'S CODE.

Section 42-1	467
" 4562	82
" 6059-2	18
" 6059-33	127, 130
" 6604-1	266, 584, 585
" 6604-2, 6604-3	267
" 6604-4	267, 268, 585
" 6604-8	586
" 7892-1	567
" 7892-13	661
" 7892-21, 7892-22	568
" 7892-70	568
" 8005	409
" 8393	284
" 8626-92	517, 530, 536
" 9112	536

PIERCE'S CODE.

77 § 133	276
77 § 567	260
77 § 1077	674
77 § 1078	675, 677
81 § 31	414
81 § 53	44
81 § 143-5	397, 623
81 § 225	122
81 § 295	400
81 § 309	60
81 §§ 631, 635	413
81 § 835	60
81 § 863	666
81 § 891	421, 699
81 § 925	300
81 § 1027	653
81 § 1033	486
81 § 1133	162

PIERCE'S CODE—*Continued.*

Page

81 § 1163.....399, 400
81 § 1187..... 93
81 § 1189..... 458
81 § 1191..... 93
81 § 1193..... 262
81 § 1223..... 93
81 § 1237.....294, 302
81 §§ 1373, 1377..... 44
81 § 1503..... 300
81 § 1699..... 62
81 § 1703..... 63
81 § 1781..... 273
135 § 67..... 162
135 §§ 321, 323, 325..... 172
135 § 331..... 160
135 § 375.....439, 602
135 § 695.....483, 607, 612
135 § 697..... 612
135 § 703..... 483
135 § 1019..... 441
135 § 1023..... 439
135 § 1121..... 114
135 § 1129..... 115
135 § 1145..... 603
151 § 1..... 253
159 § 15..... 4
163 § 149..... 247
171 § 31..... 408
171 §§ 39, 79..... 96
171 §§ 69-121..... 98
171 §§ 173, 281..... 409
171 § 176..... 25
191 § 101.....346, 347
309 § 61.....233, 657
309 § 89..... 657
309 §§ 93, 95, 97..... 545
309 § 97..... 547
309 § 117.....69, 72, 233
309 § 119..... 70
340 § 67..... 232
349 § 3..... 230
349 § 35.....73, 427
357 § 117..... 447
405 § 349..... 422

PIERCE'S CODE—*Continued.*

Page

409 § 637..... 164
413 § 3..... 83
413 § 225..... 85
413 § 345..... 84
413 § 351..... 84
477 § 13.....109, 304
477 § 131..... 381
477 § 139..... 109
477 §§ 177, 179, 181..... 490
501 §§ 17, 113..... 73
501 § 113.....528, 536
501 § 121.....465, 528, 537

SESSION LAWS.

1893, p. 386..... 303
1895, p. 341..... 376
p. 528..... 304
1897, p. 229..... 304
1899, p. 39..... 377
p. 120..... 494
1901, p. 98, § 9..... 494
1903, p. 20..... 378
p. 22, § 4..... 108
1907, p. 4, §§2, 5.488, 490, 493, 495
ch. 3, 4, 5..... 357
p. 5, §§ 1, 2..... 491
p. 6, § 5..... 492
pp. 7-11..... 493
p. 132..... 517
p. 290..... 304
1909, p. 357..... 87
p. 677..... 283
p. 705, §§ 1-13.....247, 248, 251
p. 711, § 13.....248-251
p. 757..... 304
p. 902, § 51..... 484
p. 906, § 52..... 117
p. 909, § 64..... 116
p. 944, § 188..... 438
p. 997..... 484
1911, p. 136..... 309
p. 163, § 2.....18, 19
p. 195, § 33..... 127
p. 345, §§ 1-4.....266-268

SESSION LAWS—*Continued.*

Page

1911, p. 345, §§ 1, 4, 8.584, 585, 586
p. 441..... 567
pp. 441, 446, § 13..... 661
pp. 452-453, §§ 21, 22..... 568
p. 480, § 70..... 568
pp. 601, 604, § 92..... 517
p. 604, § 92..... 530
1913, p. 256..... 284
p. 298..... 486
p. 386..... 467

SESSION LAWS—*Continued.*

Page

1913, p. 438..... 536
p. 665, § 92..... 536
1915, p. 19, §§ 1, 2.....304, 323

ORDINANCES.

Chehalis, No. 14A, § 8....671-676
Chehalis, 39A, § 8....669, 671, 675
Chehalis, No. 98A, §§1, 2.....
.....670, 671, 675
Seattle, No. 17,240, § 151.... 152

ERRATA

Page 158, 1st syllabus, last line, for of read or

Page 436, 1st, 2d, and 4th syllabus, for § 2240 read § 2440

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 12032. Department Two. February 1, 1915.]

KATIE SCHIRMER, *Appellant*, v. W. E. SCHIRMER, *Respondent*.[1]

DIVORCE—DECREE — FORM — APPEAL — HARMLESS ERROR. Where plaintiff is granted a divorce on the ground of defendant's cruelty, plaintiff, on appeal, cannot assign error in also granting the defendant a divorce on the ground of plaintiff's cruelty; inasmuch as both are necessarily divorced by the decree for plaintiff (FULLERTON and CROW, JJ., dissenting).

SAME—DECREE—DIVISION OF PROPERTY—DISCRETION. Upon granting a divorce to both parties on the ground of cruelty by each and inability to live together, the court has a wide discretion in the division of community property, which will not be set aside because the property awarded to the defendant was somewhat larger than that awarded to the plaintiff, where defendant was in debt and was required to pay plaintiff $30 per month for the support of herself and children, and attorney's fees.

SAME—ALIMONY—SUPPORT OF CHILDREN—SUFFICIENCY. An award of $30 a month to support three children, aged 16, 12, and 6 years, will not be set aside as inadequate, where the oldest, a boy, was industrious and had saved $285 from his own earnings, and there was nothing in the record to show that, at present, $30 was not sufficient for the other two.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Huneke, J., entered November 24, 1913, upon findings in a divorce action, granting a divorce to both parties and distributing the property. Affirmed.

W. B. Mitchell, for appellant.

McCarthy, Edge & Cleland, for respondent.

[1]Reported in 145 Pac. 981.

MOUNT, J.—This action was brought by the plaintiff to obtain a divorce from her husband on the grounds of cruelty and infidelity. The plaintiff prayed for a division of the property and the custody of the three minor children. The defendant, in answer to the complaint, denied the allegations of cruelty and infidelity alleged in the complaint, and filed a cross-complaint seeking a divorce from his wife upon alleged grounds of cruelty. Upon these issues, the case was tried to the court and resulted in findings to the effect that each of the parties had been guilty of cruel and inhuman treatment toward the other such as to render it impossible for the parties to live longer together as husband and wife; and concluded that each was entitled to an absolute decree of divorce from the other. The custody of the children was awarded to the plaintiff until the further order of the court. The plaintiff was awarded all of the real estate belonging to the parties, with the exception of one piece which stood in the name of the defendant's brother. The defendant was awarded the remainder of the property, consisting of mortgages, cash on hand, and stocks. The defendant was required to pay to the plaintiff $30 per month until the further order of the court for the support and care of the children. The defendant was also ordered to pay $250 for attorney's fees. He was further ordered to pay to the plaintiff certain taxes, assessments, and water rent due upon the premises decreed to the plaintiff.

The plaintiff has appealed from the decree so rendered, contending, first, that the evidence was insufficient upon which to base a finding that the defendant was entitled to a decree of divorce.

It is apparently conceded that a divorce was properly granted to the appellant, because no question is made against the finding that the respondent had been guilty of cruelty toward his wife. If a decree of divorce is granted in favor of one of the spouses, both are thereby necessarily divorced. If we should conclude, therefore, that the court erroneously

declared the respondent guilty of cruelty, the result would not for that reason necessarily be changed. The only result which would follow is that no blame would attach to the appellant. In short, the appellant's contention upon this question is based upon sentiment rather than substance. In view of this conclusion, the result will not be changed even if we should conclude that the appellant was blameless. We shall not discuss the case further than to say that we have read the evidence with some care and find that the parties had not lived together as man and wife for a period of six years prior to the date the action was brought; that, during this time, they had mistreated each other and accused each other violently of infidelity; that the respondent was the aggressor upon most occasions, and, if more blame is to be attached to one than to the other, it should be placed upon the respondent. It is apparent that the parties cannot live together as husband and wife, and that a divorce has been properly granted.

It is next argued by the appellant that there was an unequal and unjust division of the property. The evidence upon the value of the property is not definite or certain. The appellant claims that the value of the property awarded to the defendant was largely in excess of that awarded to her. It may be true that the property awarded to the defendant was somewhat greater than that awarded to the plaintiff. The property awarded to the defendant, with the exception of one piece of land standing in the name of his brother, was all personal property, some of which consisted of stocks in corporations, the value of which was and is speculative and uncertain. There were two mortgages of about the value of $8,000. There was some money in the bank, the amount of which is not clearly shown by the evidence. The defendant was in debt in about the sum of $1,500. He was required to pay to the plaintiff $30 per month for the care and support of the children. He was also required to pay the attorney's fees in the case, and the costs; and was required to make

other small payments. A wide discretion is given to the trial court by § 989 of Rem. & Bal. Code (P. C. 159 § 15) in the distribution of the community funds. We are not convinced from the evidence, nor by the argument of counsel, that the court abused its discretion in the division of the property.

The appellant also argues that the trial court erred in allowing but $30 per month for the maintenance of the children. There are three minor children. The oldest at the time of the trial was a boy sixteen years of age; the next was a boy of about the age of twelve, and the youngest was a girl of about the age of six. It was shown upon the trial that the older boy was industrious, and had saved out of his own earnings at the time of the trial $285. The other two children, so far as the evidence shows, were entirely dependent upon their parents. It may be that in a short time $30 per month will not be sufficient to properly care for these children. But at this time there is nothing in the record to indicate that $30 per month awarded to the plaintiff will not be sufficient. We find nothing in the case which justifies a reversal, or even a modification of the decree at this time.

In view of the fact that the appellant appears to have no ready money, and there is not a ready sale for the real estate, or any part thereof, at this time, and in view of the further fact that the defendant was awarded all of the personal property and available money on hand, we think it is just that he should be required to pay the costs of this appeal, exclusive of attorney's or counsel fees.

We find no error in the record, and the decree is therefore affirmed.

MAIN, J., concurs.

ELLIS, J., concurs in the result.

FULLERTON, J. (dissenting)—I am compelled to dissent from the conclusion reached by my associates. The trial court found, as matter of fact, that each of the spouses had been guilty of such a degree of marital infidelity towards the other

as to constitute a cause for a divorce on the statutory ground of cruel treatment, and that the parties could no longer live together as husband and wife. It concluded, as matter of law, that each of the parties was entitled to a divorce, and entered a decree awarding a divorce to each of them. The majority of this court conclude that the facts justified the findings, and direct an affirmance of the decree. With the conclusion as to the facts, I have no quarrel. I think it proven that each of the parties has been guilty of such a degree of cruel treatment towards the other as would warrant a decree of divorce in that other's favor had he or she been without fault. My quarrel is with the conclusion of law drawn from the facts, as it seems to me the conclusion is not sustained by the principles of law governing in such cases.

The form of the decree is somewhat unusual, but this I shall not discuss, as I conclude that it is, in effect, nothing more than is required by the code in such cases, namely, "a full and complete dissolution of the marriage as to both parties."

But it is a principle of law, as old as the law of divorce itself, that the party seeking relief from the marriage relation must come into court with a clear conscience and with clean hands, and be innocent of any substantial wrongdoing towards the other party of a like nature of which he or she complains; that divorce is a remedy for the innocent as against the guilty, and if the party seeking the divorce has been guilty of a like violation of matrimonial duties as that of which complaint is made, the action must be dismissed and relief denied. This is the principle upon which the doctrine of recrimination rests, and all of the courts agree that it is a defense to an action of divorce based upon a specific ground to show that the complaining spouse has been guilty of a like offense, although they may not be unanimous upon the question whether a like result follows when the wrongs are dissimilar in nature. I need not cite authorities to prove these propositions. They can be found in any work treating upon the subject of marriage and divorce.

Our statute, also, it seems to me, can bear no other construction. The opening sentence of the chapter on divorce and alimony provides that divorces may be granted on application "of the party injured," for the causes therein defined, and, clearly, there can be no legal injury where the conduct of the one party has been no more gross than the conduct of the other. Such, moreover, has been heretofore our uniform construction of the statute. *McDougall v. McDougall*, 5 Wash. 802, 32 Pac. 749; *Colvin v. Colvin*, 15 Wash. 490, 46 Pac. 1029; *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732; *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762; *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837; *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598; *Ellis v. Ellis*, 77 Wash. 247, 137 Pac. 453.

The case is not aided by the finding to the effect that the court is satisfied that the parties can no longer live together. While it is true the code, after enumerating certain specific causes for which a divorce may be granted, provides: "And a divorce may be granted upon application of either party for any cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together;" this clause has never been held by us to authorize a divorce merely because the court may be satisfied of the fact. On the contrary, we have held that, in addition thereto, some specific cause must be found giving rise to the conclusion, and that the party in favor of whom such cause is found has not been guilty of like misconduct towards the other party. Thus, in *McDougall v. McDougall*, the governing principle is stated in this language:

"The only theory upon which we can account for the action of the court below is that it came to the conclusion that, under all the circumstances of the case, the parties would not probably again live together as husband and wife, and from that fact assumed that it would be proper to decree a dissolution of the marriage bonds. There are some who would justify a divorce for this reason, but for the good name of our state, we are glad to be able to say, that principles of this

kind have not yet taken the shape of legal enactment here. As our statute at present stands, it is not enough to authorize a decree of divorce that the court should find as a fact, that the parties will no longer live together as husband and wife. It is necessary that there should be found to exist some of the causes mentioned in the statute in favor of the one as against the other party, and that the party in favor of whom such cause of divorce is found has not been guilty of like misconduct against the other party."

So in *Colvin v. Colvin*, it was said:

"We do not think it was intended by the legislature that a divorce should be granted in every case wherein it should be found 'that the parties can no longer live together,' and where, as here, their failure to live together is due to their own obstinacy and stubbornness, we think a divorce should be denied. It is not the policy of the law that divorce should be granted merely because parties 'from unruly temper' or mutual wranglings live unhappily together. In order to have relief, it is not required that the party complaining should be wholly without fault, for the law recognizes the weakness of human nature, and measures the conduct of the parties by the standard of common experience. But where the parties to a divorce suit are *in pari delicto*, the conduct of each being a constant aggravation to further offense by the other, no divorce will be granted at the instance of either party."

In the case of *Ellis v. Ellis*, it was said:

"Whatever may be the opinion of the individual judge as to the desirability of parties continuing in the marriage relation when they have lost that mutual respect and affection which is the basis of the relation, that relation can only be legally severed when one of the parties to it is guilty of such conduct toward the other as in law constitutes a ground for divorce. It is not enough that neither party has any regard for the other. *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21. Nor can irascibility of temper, nor a disposition to quarrel over trifles, be regarded as cruelty, within the meaning of that expression in divorce statutes. *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812. Nor is it sufficient that the parties will no longer live together in peace and harmony. *McDougall v. McDougall*, 5 Wash. 802, 32 Pac.

749; *Colvin v. Colvin*, 15 Wash. 490, 46 Pac. 1029; *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732; *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762; *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837; *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598.

"Unhappiness between husband and wife is to be deplored, but when such a condition arises between them because of mutual neglect, the remedy is not the courts, but reformation of individual conduct. The case being triable here *de novo*, this record has been read in the light of the complaints, and we cannot find evidence supporting the claims of either party to justify us in holding that a divorce should be granted against the other. Neither can we say that one party or the other is the cause of the situation in which we find them. The husband holds the wife blamable and the wife accuses the husband. Neither produces any corroboration worth mentioning. We are, therefore, driven to hold, as the lower court, that neither has sustained a cause of divorce against the other. We differ with the lower court only in its announcement that, under such circumstances, the best interests of society and the state demand the annulment of this marriage."

So, in the case at bar, since it has been found that the parties have been guilty of a like offense towards the other as that of which complaint is made, it is no ground for a divorce that the court may believe that they can no longer live together.

Nor is it any ground for granting the divorce in the first instance, or for affirming the decree in this court, that the parties themselves do not suggest the question I have discussed. Marriage is a status or institution as well as a contract, and in it the state as well as the several parties thereto has an interest. It is the duty of the court, therefore, as the representative of the state's interest, to deny the divorce when it is made to appear that the complaining party has been guilty of conduct towards the other party of a like nature of which he or she complains, whether pleaded or suggested by the other party or not.

In my opinion the only decree properly to be entered is one denying the divorce, and I think the court errs in its order of affirmance.

CROW, J., concurs with FULLERTON, J.

[No. 12485. Department One. February 1, 1915.]

MASON COUNTY, *Appellant*, v. H. E. McREAVY, *Respondent*.[1]

HIGHWAYS—ESTABLISHMENT—PRESCRIPTION. A public highway is acquired by prescription, where, by a plat of abutting uplands, a public street was attempted to be dedicated over adjoining tide lands at that time belonging to the state, and use thereof by the public was continued for more than ten years after the upland owners had acquired title to the tide lands from the state.

SAME—PRESCRIPTION—PUBLIC. A public highway may be acquired by prescription without the expenditure of public funds in improving the street.

HIGHWAYS — OBSTRUCTION — NUISANCE — WHAT CONSTITUTES. A finding that an obstruction in a street was a public nuisance is sustained, where it appears that defendants, in the nighttime, without obtaining permission, built a structure extending across the street from thirteen to twenty inches above the surface of the street, with inclined approaches on each side.

APPEAL—REVIEW—AMENDMENTS. After the introduction of evidence without objection, the complaint will be deemed amended on appeal to conform to the truth.

Appeal from a judgment of the superior court for Mason county, Claypool, J., entered July 1, 1914, discharging the jury and dismissing an action to abate a public nuisance, after a trial on the merits. Reversed.

Troy & Sturdevant and *A. J. Falknor*, for appellant.

T. P. Fisk, for respondent.

MOUNT, J.—This action was brought by Mason county for the purpose of abating an alleged nuisance upon a public highway. The complaint alleged, in substance, that within

[1]Reported in 145 Pac. 993.

said county, in the town of Union, there is a public highway known and designated as Canal street; that this street was dedicated to the public use by the owner of the fee more than twenty years ago, and for that length of time has been used continuously by all of the people of Mason county who desire to use the same; that the same is a public thoroughfare and highway, and has been such, both by dedication and by user, for a period of more than twenty years under claim of right; that, in the nighttime of December 12, 1913, the defendant placed an obstruction in said thoroughfare and highway, and denies and refuses to recognize the right of the public therein; that the board of county commissioners ordered and directed the road supervisor of that district to remove said obstruction, but the defendant prevented him from so doing; that said obstruction is a nuisance and a menace to the rights of the people of Mason county; and the complaint prays for the abatement of the nuisance.

The defendant filed a general denial to this complaint. The cause was tried to the court and a jury. At the close of all the evidence, the court discharged the jury and dismissed the action because, in his opinion, the evidence failed to show that the street at the point where the obstruction was placed was a public highway, for the reason that the public authorities had not assumed control over the street and there was no evidence that any public money had been expended upon it, or such use made of it as to constitute it a county road by prescription. The plaintiff has appealed from that judgment.

It is contended by the appellant first, that the street is shown by the evidence to be a public highway by prescription, and second, that the structure in the street is an obstruction to public travel and is therefore a nuisance.

The evidence very clearly shows that, in the year 1889, John McReavy and wife filed a plat in the office of the county auditor of Mason county platting certain lands into lots and blocks, and naming the same Union city. This plat covers

land located abutting upon Hood's Canal. The most northerly street running east and west is described on the plat as Canal street. This street had been used by the inhabitants of the county for more than twenty years. It was contended by the respondent in the court below that this street was below the line of ordinary high tide, and that, therefore, the plat that was made by John McReavy and wife, although designating Canal street as one of the streets thereon, did not constitute a street, because, being tide land, the title of the land was in the state of Washington. Subsequently, in the year 1901, the tide lands of the townsite were acquired by the defendant from the state. Since that time it is shown, practically without dispute, that a portion of this street called Canal street has been used by the public as a thoroughfare. Conceding, however, that the original plat of the street was invalid by reason of the fact that the plattors did not own the fee to the land, it was afterwards used as such street more than ten years, the same as it had been previously used. It is true that no public money had been expended upon the street by the county authorities. But this court has held that, in order to constitute a public highway, it is not necessary that public money should be used thereon, provided it has been used by the public as a road or street for a period of more than ten years. In *Stofferan v. Okanogan County*, 76 Wash. 265, 136 Pac. 484, we said, at page 273:

"In this state, however, we have repeatedly held that roads may be established by prescription by the use by the public for a period of not less than seven years, where the same have been worked and kept up at the expense of the public, as provided in Rem. & Bal. Code, § 5657 (P. C. 441 § 91), or where not so kept up at the public expense, simply by continued use by the public for a period coextensive with the period of limitation for quieting title to land, which is, in this state, ten years. *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 615; *Okanogan County v. Cheetham*, *supra* (37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027); *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858."

This being the rule, we are satisfied that there was abundant evidence to show that this street had been used as a public thoroughfare for more than ten years and was, therefore, a public highway.

We also think there was sufficient evidence to go to the jury upon the question whether the obstruction was an obstruction to public travel and, therefore, a nuisance. The evidence shows that the defendant constructed this structure in the street on the night stated in the complaint. It was a structure built of lumber extending across the street from a store building on one side of the street to a warehouse or wharf on the other. The structure was from 18 to 20 inches above the surface of the street. Inclined approaches were made upon each side. There is abundant evidence in the record to show that this was an obstruction to the street; and this court, in the case of *Miller v. Pierce County*, 34 Wash. 592, 76 Pac. 103, held, that a structure similar to this built in a public highway without authority of the county commissioners, was an unauthorized obstruction, and a nuisance. "Any unauthorized obstruction of a public highway is a nuisance." 37 Cyc. 247.

There was no claim on the part of the defendant that he obtained authority from the county commissioners, and the evidence is clear to the effect that no authority was given by the county commissioners to construct this structure upon the street. It was therefore subject to abatement at the suit of the county.

The respondent, in his brief, argues that the complaint does not state facts sufficient to constitute a cause of action by reason of the fact that the structure itself is not described, except in general terms. No motion was directed against the complaint to make it more definite and certain or to particularly describe the structure. The evidence, however, very clearly shows the character of the structure. This court has held frequently that after evidence is introduced without objection, the pleadings will be treated as amended to conform

to the evidence. *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172.

We are satisfied that the court erred in taking the case from the jury.

The judgment is reversed and the cause remanded for a new trial.

MORRIS, C. J., HOLCOMB, CHADWICK, and PARKER, JJ., concur.

[No. 12070. Department Two. February 2, 1915.]

INDEPENDENT ORDER OF FORESTERS, *Appellant*, v. H. E. BONNER *et al.*, *Respondents*.[1]

NEW TRIAL—GROUNDS—MISCONDUCT OF JURY. The fact that the jury accepted the evidence of one party rather than that of another does not show passion or prejudice.

DEPOSITIONS—EXAMINATION OF WITNESS—ANSWERS—RESPONSIVENESS. An answer to a cross-interrogatory in a deposition as to the condition in which the witness found the vital organs of the deceased when he performed the autopsy, is properly excluded as not responsive, where the answer only stated the conclusion of the witness that the condition of the organs was the same as would be caused by chronic alcoholism and that the odor of alcohol was present.

APPEAL—REVIEW—VERDICTS. A verdict upon conflicting evidence, sufficient to support the theory of either side, is conclusive on appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 12, 1913, upon the verdict of a jury rendered in favor of the defendant, in an action of interpleader. Affirmed.

Samuel R. Stern, for appellant.

Charles P. Lund, for respondents.

MAIN, J.—This is an action of interpleader, brought by the plaintiff, a fraternal insurance order, for the purpose of

[1]Reported in 145 Pac. 987.

having determined to whom should be paid the amount due on a beneficiary certificate issued to one V. R. Bonner, and for what amount the plaintiff should be held liable. The certificate called for the payment of $1,000. Under the rules of the order, when any member thereof used intoxicants to such excess as to endanger his life, or to materially affect the risk upon his life, or directly or indirectly cause his death, his insurance or mortuary benefits were reduced.

The plaintiff claims that the death of V. R. Bonner was accelerated by the use of intoxicants, and that, therefore, the amount payable to the beneficiary was $577.36. H. E. Bonner, the son, and Mrs. H. S. Fender, the former wife, both appeared in the action. Prior to the calling of the case for trial, the son filed a disclaimer. Mrs. Fender denied that the deceased's death was accelerated by the use of intoxicants, and claimed the full amount of the certificate. The cause was tried to the court and a jury. The trial judge, in submitting the case to the jury, stated that the question to be determined was whether "deceased died of alcoholism." To this instruction, no exception was taken. The jury returned a verdict for the sum of $1,000, the full amount of the certificate. Motion for a new trial, and motion for judgment notwithstanding the verdict, being made and overruled, a judgment was entered upon the verdict. The plaintiff appeals.

It is first assigned as error that "the verdict was the result of passion and prejudice and against the evidence." The testimony for the plaintiff was given by depositions. The testimony for the defendant was given orally before the court and jury. The trial proceeded with the utmost decorum. We find nothing in the record to justify the claim that the verdict was the result of passion or prejudice. The fact that the jury accepted the evidence of the defendant rather than that of the plaintiff does not show passion or prejudice.

The second error assigned is upon the ruling of the court sustaining an objection to the reading of an answer to one of the cross-interrogatories found in one of the depositions,

and the refusal of the court to permit the reading of the answer to a question in another deposition. By the cross-interrogatory, the witness was asked to state the condition in which he found the vital organs of the deceased when he performed the autopsy. The answer did not state the condition in which he found such organs, but stated the conclusion of the witness that the condition of the organs was the same as would be caused by chronic alcoholism, and that the odor of alcohol was present when the autopsy was performed. The answer was not responsive to the question. The other question to which the court sustained an objection called for a matter which was not relevant or material to the inquiry. In these rulings the trial court committed no error.

It is also claimed that the motion for judgment *non obstante veredicto* should have been granted. The evidence of the plaintiff and that of the defendant was not in harmony. The evidence offered by the defendant and the reasonable inferences that might be drawn therefrom were sufficient to sustain the verdict. On the other hand, the evidence of the plaintiff and the reasonable inferences that might be drawn therefrom would have sustained a verdict as contended for by it. The disputed question was one of fact and, consequently, it was for the jury to determine. The appellant in its brief states: "There is but one disputed question of fact in this case and that is whether the decedent's death was caused in whole or in part from the use of alcoholic beverages." The jury having spoken upon the disputed question of fact, and there being evidence to sustain the verdict, it will not be disturbed by this court.

There are other assignments of error, all of which have been considered, but in none of them do we find substantial merit.

The judgment will be affirmed.

CROW, MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12171. Department Two. February 2, 1915.]

W. Manheim, *Appellant*, v. Standard Fire Insurance Company, of Hartford, Connecticut, *Respondent*.[1]

Insurance—Fire Insurance—Waiver of Defenses—Acts of Adjusters — Authority — Statutory Provisions. In the absence of proof of special authority, an adjuster's investigation after proofs of loss are made, and his demand for duplicate invoices from the insured, do not constitute a waiver of objections or estop the company from defending an action on a fire insurance policy for false swearing in the proofs of loss, in view of 3 Rem. & Bal. Code, § 6059-2, defining an "adjuster" as one who undertakes to ascertain and report the actual loss due to the hazard or peril insured against; since the statute having defined the duties of an adjuster, there could be no presumption of other authority from the fact that he was acting as adjuster.

Insurance—Fire Insurance—Policy—Provisions—Waiver. Under a policy of fire insurance providing that the company shall not be held to have waived any provision in the policy by any act relating to the appraisal or examination provided for, the defense of false swearing in making the proofs of loss is not waived by an adjuster's investigation after proofs of loss are made or by his demand for duplicate invoices; since the policy contemplates a full and complete investigation as to the property destroyed and its value.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered November 17, 1913, upon the verdict of a jury rendered in favor of the defendant, in an action to recover losses on fire insurance policies. Affirmed.

G. G. Lee, for appellant.

Granger & Clarke and *Fred Parker*, for respondent.

Crow, J.—Two causes of action, to recover for losses sustained by fire, based on separate policies of insurance, are pleaded herein. From a verdict and judgment entered on the first cause of action in favor of defendant, the plaintiff has appealed.

[1]Reported in 145 Pac. 992.

The complaint in substance alleged, that on November 19, 1912, the respondent, Standard Fire Insurance Company, of Hartford, Connecticut, a corporation, executed and delivered to the appellant, W. Manheim, policy No. 900,501, whereby, for the period of one year, it insured appellant's stock of furnishing goods in a store in North Yakima, against loss by fire, in the sum of $2,500; that other concurrent insurance was permitted; that appellant procured additional concurrent insurance in the sum of $10,000; that the merchandise was totally destroyed by fire on February 12, 1913; that its value was not less than $14,000; that appellant immediately notified respondent of the loss and submitted proofs of loss within sixty days after the fire; that respondent's adjuster investigated the fire and the loss sustained; that appellant fully performed all conditions and stipulations of the policy on his part to be performed, and that, after receiving the proofs of loss, respondent refused to pay the loss which appellant had sustained.

Answering the complaint, respondent alleged that the policy of insurance contained the following provision:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; . . . or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss;"

that, subsequent to the fire, appellant furnished and delivered proofs of loss to respondent in which he stated that the insured property amounted to $14,262.70; that the statement was false; that it was intentionally made for the purpose of deceiving and defrauding respondent, and that the value of the property at the time did not exceed $2,500, as appellant well knew. For affirmative reply, appellant alleged that one A. W. Jones, an adjuster, acting for respondent, after receiving the proofs of loss, demanded of appellant that he fur-

nish the adjuster with duplicate invoices of the goods, wares, and merchandise destroyed; that, in so doing, appellant was put to considerable trouble and expense, and that respondent was thereby estopped from defending on the ground of fraud and false swearing.

The controlling contention which appellant makes by his various assignments of error is that the action of respondent's adjuster in making an investigation after the proofs of loss were made, and in demanding duplicate invoices from appellant, constituted a waiver of objections on the part of respondent and estopped respondent from defending this action on the ground of appellant's false swearing. It is not contended that the verdict of the jury on the issue of false swearing was not sustained by the evidence. We are unable to conclude that respondent waived the defense of fraud and false swearing, or that it was estopped from urging the same. There is no showing that Mr. Jones occupied any position other than that of an adjuster, or that he was authorized to bind the respondent corporation by waiving any of its rights. All he was authorized to do was to investigate the fire, ascertain as nearly as possible the loss which appellant had sustained, and report his findings to respondent. An adjuster and his duties are defined by § 2 of chapter 49, Laws of 1911, at page 163, in the following language:

"'Adjuster' or 'Insurance Adjuster' is a person, copartnership or corporation who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against." 3 Rem. & Bal. Code, § 6059-2.

No evidence was presented showing or tending to show that any additional authority was conferred on the adjuster by respondent which would have the effect of empowering him to waive any of respondent's rights or to admit or deny its liability. In the absence of some such showing, his only authority would be to investigate the fire, the amount of property destroyed, and the actual loss sustained, and report

his findings to respondent so that it might determine the question of liability. The statute having defined the duties of an adjuster, no presumption that he had authority to perform other duties and thereby bind the respondent can arise from the mere fact that he was acting as an adjuster. The policy, which in its form and provisions complies with chapter 49 of the Laws of 1911, p. 163, contained the following clause:

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to the examination herein provided for."

The manifest purpose of this clause is to permit the insurance company to cause a full and complete investigation to be made as to the value of the property destroyed and the amount of loss or damage sustained. The policy expressly provides that the company may examine invoices, or certified copies if the originals be lost, and that by so doing it does not waive any provision or condition of the policy. No construction of insurance laws should be made, if avoidable, which would permit an assured to defraud the insurance company. No assured who is exercising honesty in his dealings will object to a thorough investigation or examination of his books and invoices by an adjuster, after his proofs of loss have been made and delivered to the company. It is not contended that the clause of the policy pleaded in the answer is invalid, nor is it contended that the jury was not justified in finding from the evidence that appellant had in fact made false proofs of loss whereby for fraudulent purposes he intentionally overestimated the amount of property destroyed.

There is nothing in the record which would have justified the trial court in withdrawing the cause from the jury and directing a verdict for the appellant. The judgment is affirmed.

Fullerton, Mount, Main, and Ellis, JJ., concur.

[No. 12421. Department One. February 2, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Union Trust & Savings Bank et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN — PROPERTY SUBJECT — ALREADY DEVOTED TO A PUBLIC USE—FUTURE NEEDS — EVIDENCE — SUFFICIENCY. An electric power company desiring to construct a hydro-electric power plant on its site cannot condemn a power site further up the river which another similar public service corporation, already extensively operating, had acquired for its future needs with the intention of devoting it to the same public use within a reasonable time, and the development of which it now intends to prosecute with diligence, having the means to do so; especially where it clearly appears that, by reason of the more extensive field to be served and the magnitude of its present business, the full capacity of such site will be required as soon as it can be developed in order to keep pace with the natural expansion of its present public service.

SAME—PRESUMPTIONS. Property acquired by a public service corporation in reasonable anticipation of its future needs, is deemed devoted to a public use until abandonment of intention to so use it.

Certiorari to review a judgment of the superior court for Spokane county, Sullivan, J., entered September 26, 1914, adjudging a public use and necessity in eminent domain proceedings, after a trial to the court. Reversed.

Graves, Kizer & Graves, for relators.

H. M. Stephens, H. S. Stoolfire, and *Burcham & Blair*, for respondent.

PARKER, J.—Certiorari to review an order of public necessity entered in an eminent domain proceeding.

The Spokane & Inland Empire Railroad Company will hereafter be called the relator. The Spokane Valley Power Company will be called the respondent. The relator was incorporated as a public service corporation in 1906, for the purpose of taking over the properties of the Spokane Trac-

[1]Reported in 145 Pac. 999; 149 Pac. 324.

tion Company, organized in 1903, which had built and was operating street railway lines in Spokane; the Coeur d'Alene & Spokane Railway Company, organized in 1902, which had built and was operating a railway line to Coeur d'Alene, Idaho, and beyond; the Spokane & Inland, organized in 1904, which was building and had partially in operation railway lines in the Palouse country; and the Spokane Terminal Company, organized in 1905, which owned the terminals in Spokane used by the other companies. All of these properties were operated electrically. The relator has a capital stock of $10,000,000 and a property investment of approximately $25,000,000. It acquired from its predecessor a power site on the Spokane river known as the "Nine Mile" site. In 1906, it acquired a power site between the city of Spokane and the Nine Mile site, known as the "Bowl and Pitcher" site. With the Bowl and Pitcher site, it acquired a light and power franchise theretofore granted by the city of Spokane. It paid $50,000 for the power site and franchise. Neither of the original companies owned the electric power for the operation of its property. Each thereof had a separate contract for electric power with the Washington Water Power Company, expiring in 1916. The relator took the properties subject to these contracts.

In April, 1908, the relator entered into a contract with the Washington Water Power Company in lieu of the several separate contracts of its predecessors, whereby it agreed to take the amount of power covered by their contracts until the completion of its Nine Mile plant then in process of construction, and to take thereafter until October 12, 1916, 3,800 horse power. It was agreed that neither the relator nor the three original companies would, prior to October 12, 1916, engage in the sale of electrical power for light or power purposes within the city of Spokane or in the Coeur d'Alene mining district, Idaho; that, thereafter and some time in 1908, the relator completed its Nine Mile power plant, which furnishes a maximum of 15,000 horse power, at a cost of ap-

proximately $1,500,000. It commenced the construction of this plant in 1906. The relator owns and operates a street railway system in Spokane, and interurban lines running into various points in Washington and Idaho. It has a total urban and interurban mileage of 290.94 miles, all of which it operates by electricity. It uses a maximum of 8,900 horse power in the operation of its railway system, and furnishes 2,600 horse power for irrigation enterprises, making a total of 11,500 horse power devoted to a public use. When its contract with the Washington Water Power Company expires in 1916, it will not have sufficient power for these uses. For some time prior to the commencement of the work on the Nine Mile plant in 1906, the relator was considering the relative feasibility of the two sites, and hesitating as to which site it should first develop.

The respondent was incorporated as a public service company in 1913, with a capital stock of $200,000 fully subscribed. Between that date and September 30, its stockholders conveyed to it certain overflow and water rights on the banks of the Spokane river for a consideration of $200,000. They took stock to the extent of $142,500 and placed the balance of $57,500 in the treasury. The stock is assessable to the extent of twenty-five per cent of its par value. Some of the respondent's land is above and some below the Bowl and Pitcher site which it seeks to condemn. The respondent's proposed power plant would create a lake about seven and one-half miles in length with the relator's land near the center. It cannot develop its plant without acquiring the relator's land. In January, 1914, the respondent commenced work at its dam site. On March 20, its trustees directed that the construction work should be prosecuted with diligence. In April, it began certain condemnation proceedings against other parties. In May, it made a tentative arrangement with the Spokane & British Columbia Railway Company to furnish it electric power. It expended before the hearing of this cause several thousand dollars in the

prosecution of its proposed enterprise. The respondent desires to construct a hydro-electric plant at its site on the Spokane river below the Bowl and Pitcher site. The plan which the respondent proposes to carry out would cost about $1,500,000.

The relator acquired the Bowl and Pitcher site in anticipation of its future needs; that is, it foresaw that, within a reasonable time, it would require the power which the two sites would develop to meet its needs in the operation of its system in the progress of its anticipated expansion, and in furnishing power for public use as an auxiliary to the full development of its system. Its good faith in acquiring and holding the Bowl and Pitcher site is shown by its several resolutions between April, 1906, and October, 1906. That it intends to develop this site is shown by its resolution of April 15, 1914, wherein it was resolved:

"That for the purpose of developing electric power to be used for the operation of its own and other railway lines and to enable this company to utilize its franchise in the city of Spokane and in other cities and towns where it may now have or hereafter acquire franchises for the disposal of electric current for the public, that the company with all convenient dispatch proceed to construct a dam and power plant on the Spokane river,"

upon the lands in controversy. It was further resolved that the president of the company,

"Be and he is hereby authorized and directed to cause the necessary surveys to be made and plans to be drawn for the construction of a dam and power plant, to acquire such additional lands and such flowage rights as may be necessary for the proper development of electrical power . . . to make such financial arrangements as may be necessary for the construction of the plant and the development and utilization of electrical power thereat, to enter into any and all necessary contracts for construction, machinery and additional engineering . . . and to do any and everything necessary or desirable for the construction of a power plant at the point aforesaid, and the development and utilization of electrical power thereat."

It was further resolved that he should apply to the Federal government for flowage rights upon such of the Fort Wright grounds as the engineer's report should show to be necessary in the development of its plant, and apply for and obtain additional franchises from counties, cities, and towns which may be necessary or convenient in the utilization of the electric power to be developed, make contracts with municipalities or railway companies for the disposal of any power not needed for the purposes of the company, for public purposes, and execute in the name of the relator all contracts proper for the complete execution of the powers granted.

Mr. Wickersham, the relator's electrical engineer, testified:

"To sum it up, however, I might say that the average increase for each year from 1909 to 1914 has been about 20 per cent a year, and on that basis we assume that five years will double the capacity of the present load. That has been checked by checking each individual consumer and analyzing the possibilities of his plant and considering our own requirements, without considering any extensions or any natural reserve that a power company should carry, and also taking over the Washington Water Power load, and we are convinced after the analysis that by the year 1918 the Inland Company will have to supply a load of approximately 25,000 horse power. Should any additional extensions be made, or we have the opportunity to sell power in Spokane, as we will after the year 1916, or receive larger consumers than we know of now, we may have to supply 8,000 to 10,000 horse power more. That is a reserve that any power company for its own safety should provide sufficiently far ahead of the actual demand for the power, so that in the year 1920 the Inland Company will be required, or should have to serve its interests, at least 35,000 horse power, which is the combined output of both the Bowl and Pitcher and the Nine Mile plant."

Mr. Gilman became the relator's president in January, 1914. He testified that the board of directors had directed the development of power at the site in controversy; that it

had the ability to do so, and that it intended to do so. He further said:

"That for an electric system like ours the power is the heart of the system, and if we are stripped of our ability to produce power we are limited in our operations to the power that we have at the present time so that when the country grows—when the Palouse is cut up, for example, and it is necessary to double track, or extend our lines as the city grows, and we are required to extend our street car lines, or to put more cars or more service on the present lines, we will not have the ability to do so, because we will not have the power."

It would take two years, that is two seasons of low water, to complete the plant at either site. The relator cannot complete the development of a plant at its site without acquiring flowage rights for the back water. In this respect the parties stand upon an equal footing.

Our statute, Rem. & Bal. Code, § 925 (P. C. 171 § 176), provides that, before property can be taken for a public use, two facts must be made to appear: (1) that the contemplated use for which the property is sought to be appropriated is "really a public use," and (2) "that the public interest requires the prosecution of such enterprise." All property is held subject to the power of the state in the exercise of its sovereignty to appropriate it to a public use. Public service corporations are only permitted to exercise the power of eminent domain, an attribute of sovereignty, when the public interest will be promoted. We have held that property owned by a corporation and devoted to a public use cannot be taken by condemnation except in special cases not here present, to be used for the same purpose and in the same manner. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. Harbor Boom Co. v. Superior Court*, 65 Wash. 129, 117 Pac. 755; *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637. We have also held that property owned by a corporation "and not actually devoted to a public use" may be

acquired by condemnation. *Samish River Boom Co. v. Union Boom Co., supra.* The right to condemn in a particular case depends upon all the attending facts and circumstances. *Samish River Boom Co. v. Union Boom Co., supra.* It has become the settled law of the state that a public service corporation may acquire property by condemnation or otherwise in reasonable anticipation of its future needs. When property has been so acquired, it is deemed devoted to a public use although not actually devoted to such use, until there has been an abandonment of the intention so to use. *Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 40 Wash. 315, 82 Pac. 412; *State ex rel. Spokane Falls & N. R. Co. v. Superior Court*, 40 Wash. 389, 82 Pac. 417; *Neitzel v. Spokane International R. Co.*, 80 Wash. 30, 141 Pac. 186; *Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358.

In the *Nicomen Boom Company* case, this court, speaking through Judge Hadley, said:

"It is also held that the question of future needs of railroad companies, in fulfilling their charter purposes and performing their public duties as common carriers, is one which should be given full consideration by a court before it undertakes to deprive a company of any part of its right of way in favor of another corporation. Such companies may anticipate future necessities and may, for that purpose, hold territory not in actual use to the exclusion of other companies."

In the *Spokane Falls & N. R. Co.*, case, it was said by Judge Dunbar, speaking for the court:

"It is true that the International railroad is not yet in operation, but the testimony shows that a large portion of the grading has already been contracted for, and that the whole road will be in operation in the near future; that it has traffic relations with the Canadian Pacific, and expects to be in reality the western portion of a transcontinental road. Although it is not yet in operation, companies of this kind must procure grounds for terminal facilities before they commence their operations. The necessity of the business requires this, and, when once they make their calculations to procure these facilities, which this company did at an

expense of $150,000 in purchasing this land, they will be protected in those terminal rights to the same degree as will a company which is already operating its roads."

In the *Neitzel* case, we said:

"A public service corporation may anticipate future needs, and mere nonuser of a portion of its easements does not, of itself, constitute an abandonment. Whether or not there has been an abandonment depends upon the intention of the owner of the easement. While such intention may be deduced from long nonuser, the nonuse itself does not constitute an abandonment, and does not of itself defeat or impair acquired rights."

In the *Merriam* case, we voiced the same principle, saying:

"It was not incumbent upon the city to show an immediate necessity for an immediate use. The showing of a reasonable necessity for use in a reasonable time is all that can be required. A municipal corporation has the same right to be provident and forehanded in the acquirement of property for a public use that a public service corporation has."

In *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591, we recognized the rule of comparative necessity, saying:

"Whether the use is a public use, and whether the public interest requires the prosecution of the enterprise, and what lands etc. are necessary for the enterprise, are all matters referred to the court for determination. Rem. & Bal. Code, § 925. From this results the doctrine which, for lack of a better name, may be called comparative necessity. If by the plan proposed the present and future public use and interest, as now apparent from the evidence, are met, that is as far as the court need now inquire."

The respondent has cited *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, and *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811. In each of these cases the proceedings were conducted under a different statute, as will appear from a reading of the cases. In *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25, the city condemned a strip of land thirty feet in

width along the boundary of the University ground, for street purposes. The statute authorized the proceeding and the uses were dissimilar. In *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175, it was not shown that the defendant would need or use the property in controversy for public purposes, within a reasonable time. In *North Coast R. v. Northern Pac. R. Co.*, 48 Wash. 529, 94 Pac. 112, it was held that a portion of a railroad right of way through a defile which could be spared without material detriment, could be condemned where the public interest required it. In all condemnation cases the paramount consideration is the public interest, and to that interest all rights must bow and all rules must bend. The record shows that the relator acquired the property sought to be condemned with the intention of devoting it to a public use within a reasonable time; that it now intends to prosecute the development of the power site with diligence and that it has the means so to do. The purposes to which the parties desire to devote the property are the same.

The judgment is reversed, with directions to dismiss.

MORRIS, C. J., CROW, and CHADWICK, JJ., concur.

ON REHEARING.

[*En Banc.* June 12, 1915.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein. For the reasons there stated, the judgment is reversed, with directions to dismiss.

[No. 12475. Department One. February 2, 1915.]

B. P. BRISCOE, *Appellant*, v. WASHINGTON-OREGON CORPORATION, *Respondent*.[1]

APPEAL—REVIEW—HARMLESS ERROR—ERROR NOT AFFECTING RESULT. Error in instructions to the jury is harmless, where the case should have been taken from the consideration of the jury, or no other verdict could be sustained.

MUNICIPAL CORPORATIONS—STREETS — NEGLIGENT USE — COLLISION WITH STREET CAR — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. The driver of an automobile was guilty of contributory negligence precluding any recovery, where it appears that, in making a right angle turn, he drove his car upon a street car track directly in front of an approaching street car, which was in plain sight, and was unable to stop in time to avoid a collision; his negligence being the proximate cause of the accident regardless of the speed of the approaching street car.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered July 7, 1914, upon the verdict of a jury rendered in favor of the defendant, in an action for damages from a collision with a street car. Affirmed.

Walsh & Lee, for appellant.

Forney & Ponder, for respondent.

MOUNT, J.—The plaintiff brought this action to recover damages by reason of the alleged negligence of the defendant in the operation of a street car so that it collided with an automobile driven by the plaintiff. The defendant in answer to the complaint denied the allegations of negligence and alleged contributory negligence on the part of the plaintiff. Upon these issues, the case was tried to the court and a jury. A verdict was returned in favor of the defendant. The plaintiff has appealed.

Counsel for the appellant argue at length that the court erred in instructing the jury. The instructions complained of are not set out in the brief. Only a part of the instruc-

[1]Reported in 145 Pac. 995.

tions given by the court are set out in the appellant's abstract of the record. The argument in the brief is directed to certain words and certain sentences which the appellant asserts should have been included or omitted in certain instructions. It is difficult to understand, from reading the brief alone, the points attempted to be made by the appellant upon these instructions. We have carefully read the instructions given by the court and are convinced that they contain a correct statement of the rules of law applicable to the case. Clearly the appellant has no valid and reasonable complaint upon any of the instructions given. They were certainly as favorable as he was justly entitled to. We shall not enter into a discussion of the questions presented upon the instructions because we are satisfied that if there could be a case where it was the duty of the court to take the case from the jury or direct a verdict for the defendant, this is such a case.

It appears that the respondent was operating a street car line in the city of Centralia. On June 28, 1913, the appellant stopped his automobile on the west side of Tower avenue in the city. Thereafter he started his car south on this avenue and went for a short distance, possibly 100 feet, where he attempted to make a square turn east on Locust street which crossed Tower street at right angles. As he did so he turned in front of a street car moving north on Tower avenue. The automobile was damaged and the appellant himself was injured. By the great preponderance of the evidence, both for the appellant and for the respondent, it was shown that the appellant, without any care for his safety, drove his automobile upon the street car track immediately in front of the moving street car. Not only by the great weight of the evidence of the witnesses, of whom there were several, was this fact shown, but all the circumstances tended to show that the appellant carelessly and negligently drove his automobile in front of the approaching car, and that there was no time for the street car to be stopped and the accident avoided. The negligence of the plaintiff

was clearly established. The only negligence claimed against the street car company was that the car was traveling at an excessive rate of speed. But whether it was or not, there was nothing in front of the appellant to obstruct his view. The street was open; the street car was in plain sight upon the track; and there can be no doubt of the fact that the proximate cause of the accident was the plaintiff's own negligence. The jury, under proper instructions, so found. We deem it unnecessary for this reason to consider the technical objections made to the instructions, or to consider the motion for a new trial. It is plain from the whole record that no other verdict could have been sustained, even though the criticisms of the instructions complained of by the appellant are well taken.

The judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, PARKER, and HOLCOMB, JJ., concur.

[No. 12472. Department One. February 3, 1915.]

ALLEN MILLER, *Respondent*, v. EASTERN RAILWAY & LUMBER COMPANY, *Appellant*.[1]

WATERS AND WATER COURSES—WHAT CONSTITUTES—STREAMS OR SURFACE WATER—EVIDENCE—SUFFICIENCY. In an action for damages for the obstruction of waters, causing an overflow of adjoining lands, a finding that the same was a water course, and not surface waters, is sustained where it appears that living and flowing waters from a gulch to the east flow or move to the westward in all seasons and under all conditions, spreading out over and crossing plaintiff's low lands by natural gravitation and finding their way into a water course to the west of plaintiff's lands, which were agricultural lands and easily made dry and fit for cultivation by surface ditches converging toward such water course.

SAME—SPREADING WATERS. In such a case, if the same was not a water course within the common definition of the term, it is a water course in the sense that there is a natural gravitation of living, flowing waters which one proprietor cannot arrest to the damage of his neighbor.

[1]Reported in 146 Pac. 171.

SAME—SWAMP LANDS. In such a case, the plaintiff's land was not swamp land, but natural soil over which a water course has spread itself, and the owner had a right to direct the waters in surface ditches over his land.

APPEAL—REVIEW—HARMLESS ERROR—CURED BY VERDICT. In an action for damages to crops and live stock by the obstruction of a stream and overflowing plaintiff's lands, in which the court instructed the jury that the plaintiff could not recover for loss of live stock if acts of the plaintiff concurred to produce the loss, or if the jury was unable to say which cause produced it, and there was ample evidence to sustain the verdict by reference to damage to crops alone, it is a fair inference that the verdict was based on the loss of crops, and error cannot be predicated on the evidence or instructions relating to the live stock.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered April 13, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for overflowing lands. Affirmed.

Forney & Ponder, Dysart & Ellsbury, and *C. D. Cunningham*, for appellant.

A. A. Hull and *J. M. Orrick*, for respondent.

CHADWICK, J.—Respondent is a lessee in possession of a tract of land lying east of property owned by appellant, and occupied by it as a sawmill property. The property was low ground and is put to agricultural and garden uses. Before the land was cleared and cultivated, the surface waters and waters drawn from a gulch to the east of respondent's property scattered over his land. Three ditches have been dug across the land. These flow into a channel called China Ditch. The three ditches converge at or about the east line of appellant's property. In the spring of 1913, appellant, intending to dredge and deepen its mill pond, cut a ditch across its own premises from a point above its mill leading down to China Ditch, its purpose being to lead the water around its pond so that its continued flow would not interrupt or interfere with the work of dredging and deepening the mill pond. The plan necessitated the damming of

the old time ditch so as to divert the flow. A great bank of earth was thrown out by the dredger. This in turn was leveled with a scraper and by playing a hose upon it for the purpose of washing it down. The new or temporary ditch was bulk-headed. It is contended that the ditch was allowed to become broken, filled and choked with mud and debris, so that the waters could not flow with sufficient rapidity to prevent a back flow and covering of a material part of respondent's land with water. The jury returned a verdict for $150. After the usual motions had been overruled, judgment was entered on the verdict.

The first contention is that the evidence is not sufficient to sustain the verdict. This contention is predicated upon legal questions which are saved by exceptions to the instructions given and refused, and we shall pass it, for unless the law be as appellants contend, it is clear to us that there is evidence to sustain the verdict.

Several assignments raise the question whether, under the testimony, the waters flowing over respondent's lands were surface waters or a water course within the definition of that term.

The court very fully and fairly instructed the jury defining water courses and surface waters. The jury were told that respondent could not recover unless they found a water course over respondent's lands. The court defined a water course as a stream having beds, banks, and a periodical flow, and instructed that it was not necessary to prove that the water at all times flowed within defined banks; that if it spread out over land so as to make it swampy in character, yet, nevertheless, if it continued in a general course over the respondent's land, the defendant would not have a right to obstruct the flow. There was testimony sufficient to sustain a finding of the jury upon this theory of the law. Moreover, the jury viewed the premises and must have found that the testimony of the respondent and his witnesses had a foundation in fact.

Appellant insists that the flow is that of surface waters, and it had a right to obstruct it even to causing a back flow over the respondent's lands whenever the necessity of protection or lawful use of its own property required it.

This court has held to the outlaw doctrine of surface waters. *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859; *Harvey v. Northern Pac. R. Co.*, 63 Wash. 669, 116 Pac. 464. A swamp or swale is not ordinarily held to be a water course. *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141; 1 Kinney, Irrigation & Water Rights, p. 515. But it would not follow that the waters of a swamp are surface waters. A swamp or swale may be a water course. If the waters which had accumulated upon respondent's land had flowed in natural channels up to or about the east line of his property and then spread out over an area without beds and banks so as to form a swamp, the stream would be a water course. 1 Kinney, Irrigation & Water Rights, pp. 512-515; *Hastie v. Jenkins*, 53 Wash. 21, 101 Pac. 495.

"Where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks does not affect its character as a watercourse. *Macomber v. Godfrey*, 108 Mass. 219 (11 Am. Rep. 340); *West v. Taylor*, 16 Or. 165 (13 Pac. 665)." *Miller & Lux v. Madera Canal & Irr. Co.*, 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391.

Where there is a spreading of a stream which still moves by natural gravitation in a certain direction to a common or defined channel, it is a water course. In the case at bar, the waters flowing across respondent's land find their way into the water course called China Ditch. There is testimony tending to show, in the instant case, that the waters complained of flow or move to the westward in all seasons and under all conditions.

Nor can it be said that the waters of which respondent complains are surface waters. Surface waters which may

become vagrant and subject to outlawry are waters accumulating and spreading in consequence of heavy rains and storms. *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859; 40 Cyc. 639.

"'Surface' water may be defined as water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well defined and substantial existence." 1 Kinney, Irrigation & Water Rights, § 318.

The distinction governing in this case may be illustrated by reference to *Dickey v. Maddux*, 48 Wash. 411, 93 Pac. 1090, and *Hayward v. Mason*, *supra*. In these cases the lands sought to be made the subject of riparian right were held not to be so. In each case the court assigned as a reason for its holding the fact that there was no outlet to the swamp or bog. If it had been otherwise, it is evident that the court would not have held as it did.

Neither is respondent's land swamp land within the ordinary meaning of that term. Swamp land has been defined to be such as requires drainage to fit it for cultivation. *San Francisco Sav. Union v. Irwin*, 28 Fed. 708. In the instant case, it appears that no more was required than to dig a few surface ditches to confine the flow. With the waters flowing in the surface ditches the land was dry and fit for cultivation. A right to change a channel or to confine spreading waters in a fixed channel, no right of the public or of any third party intervening, is a right incident to the proprietorship of land. *State v. Barker*, 37 Utah 345, 108 Pac. 352, 27 L. R. A. (N. S.) 1138.

Whether, in discharging the waters from his land, respondent has injured appellant, we are not called upon to say. That case is not before us.

We conclude: if this case be resolved as a question of fact under the instructions of the court, there is sufficient testimony to sustain the verdict and consequent conclusion that the flow is a water course, within the common definition of the

term; or, if it be not that, it is a water course in the sense that there is a natural gravitation of living, flowing waters, which one proprietor cannot arrest to the confusion and damage of his neighbor; or, it may be held that the land is not swamp land, but natural soil over which a water course has spread itself and the owner had a right to lead the waters in surface ditches and over his land. Upon any one of these theories, the verdict of the jury must be sustained.

It is complained that the court permitted testimony tending to prove that the accumulated waters caused the death of some of respondent's poultry and live stock. A part of this testimony was stricken and the jury was cautioned not to consider it. It appeared that respondent fed his poultry on swill gathered in the city. Appellant insists that it is as likely that respondent's poultry suffered from the character of the food given them as from the water which had been backed over the land. The court instructed the jury that, if it found that the act of respondent concurred with that of the plaintiff and the two causes produced the loss of poultry and stock complained of, respondent could not recover; and further, if it was unable to say to which cause the loss might be attributed, it should find for the appellant. There is ample testimony to sustain a finding that respondent's crops were damaged in a sum equal to the verdict. It is a fair conclusion that the jury, under the instructions of the court, rejected all the elements of damage going to the loss of poultry and live stock, and based its verdict upon a finding that appellant was answerable for the loss of crops alone.

The judgment of the lower court is affirmed.

MORRIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 12281. Department Two. February 4, 1915.]

FANNIE GAMER, *Appellant*, v. FRED C. SCHLENTZ, *Respondent*.[1]

APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. The discretion of the trial court in granting a new trial upon conflicting evidence as to whether the jurors were guilty of misconduct in agreeing to be bound by the result of a quotient verdict, will not be disturbed on appeal, where it cannot be said that the evidence preponderates against the finding of the trial judge.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 1, 1914, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Frank H. Kelley and *Ralph Woods*, for appellant.

Burkey, O'Brien & Burkey, for respondent.

MORRIS, C. J.—Appeal from an order granting a new trial. The order in question granted a new trial generally, but counsel for appellant urges that it was made solely upon the ground of misconduct of the jury in reaching a quotient verdict, and seeks to have us review the order as if so made; contending that the lower court, upon the facts before it as shown in affidavits made by certain of the jurors, erred in its ruling and should have held that there was no misconduct in the particulars urged by respondent. In other words, appellant contends that the lower court reached a wrong conclusion upon a question of fact. The motion for a new trial was made upon several grounds, and the order granting the same, as above indicated, was general in its nature. Whether we review the order as a general order, or particularize it as counsel for appellant would have us, the result is the same. In granting motions of this character, trial courts are vested

[1]Reported in 146 Pac. 166.

by the statute with a peculiar discretion—a discretion resting in the trial court and not in this court—and which we have often said will not be interfered with by us except for its clear abuse. *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166, where the cases so holding are collated. This discretion was here exercised in reviewing sharply controverted questions of fact, which, having been determined by the lower court, will be accepted here unless we can say that the evidence preponderates the other way. We cannot so say. Some statements in these affidavits clearly indicate a quotient verdict. Others, greater in number, deny it. Preponderance or weight of evidence is not always with the greater number of witnesses. The verdict was for $2,008, and it is admitted by all of the jurors who make affidavits that this amount was the quotient derived by dividing by twelve the sum of the amounts individual jurors considered proper; the only disputable question being whether or not the jurors in advance agreed to be bound by such a result. The lower court has found in favor of respondent, and not being satisfied that it was error so to do, the judgment is affirmed.

Crow, Ellis, Fullerton, and Main, JJ., concur.

[No. 12412. Department Two. February 5, 1915.]

PETER SKANSI *et al.*, *Respondents*, v. JOHN NOVAK *et al.*, *Appellants*.[1]

ADVERSE POSSESSION—CLAIM OF RIGHT—MISTAKEN BELIEF—EVIDENCE—SUFFICIENCY. Under the rule that adverse possession must be under a claim of right for the full statutory period of ten years where there is no color of title even if possession was under a mistake, and that entry and possession under the mistaken belief that it was public land is not hostile or adverse to the owner, the purchaser of a lot in a dedicated plat does not, by adverse possession, acquire title to a strip of adjoining tide lands, about fifty feet wide, extending to the government meander line, which strip was not included in the dedicated plat, a portion of which he occupied with a boat shop and float for eighteen years, where his testimony was to the effect that, at the time of his purchase, he supposed that he was buying "to the water" or to the line of high tide, that his boat shop was above that, and he supposed his ownership to high tide gave him the right to the tide lands (which belong to the government), that he had no knowledge of the meander line, no representations were made, and he made no express claims of title; and when he sold, he described the lot only, and moved off his boat shop and float.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 13, 1914, upon findings in favor of the plaintiffs, in an action to quiet title. Reversed.

J. W. A. Nichols, for appellants.

J. W. Selden and *W. A. Johnson*, for respondents.

ELLIS, J.—This is an action to quiet title to a small tract of land lying between lot 4, in block 2, of the town of Millville, in Pierce county, and the government meander line of Puget Sound. The plaintiffs claim title by adverse possession; the defendants, by mesne conveyances from the United States. There is little dispute as to the facts. The only real controversy arises from inferences which the contending parties seek to draw from the facts. Since we are forced to a conclusion contrary to that reached by the trial court, we

[1]Reported in 146 Pac. 160.

shall state the evidence at a length which would otherwise be unnecessary.

The land covered by the present townsite of Millville passed by patent from the United States in 1869, long prior to the adoption of the state constitution. The patent therefor carried title to the government meander line, which included a strip of tide land of varying width along a large part of the water front of the present townsite.

In June, 1888, the defendants, who it is admitted then owned the upland and this bordering strip of tide land, by a plat legally executed and recorded, laid out upon the upland only, the town of Millville. This left, in front of the shore line proper of lot 4 in block 2, an unplatted strip of tide land, fifty feet wide, forty-seven feet along its northerly border and approximately seventy-six feet along its southerly border, which would have been included between the northerly and southerly lines of the lot, had they extended to the government meander line. This is the tract in controversy.

In July, 1888, the defendants Novak, who it is admitted had, in the meantime, acquired full title to lot 4 in block 2, conveyed that lot, by description according to the recorded plat and by direct reference thereto, to one Patrick.

Patrick's testimony, which is mainly relied upon as establishing plaintiffs' title by adverse possession, was, in substance, that he had no recollection that any one so represented, but he supposed, when he bought the lot, that "it ran from the street to the bay;" that he supposed he bought "to the water;" that he did not know where the meander line was and does not know where it is now; that he did not remember that anything was said to lead him to believe he was buying to the meander line, only, "I supposed I was buying to the water;" that the water was what he was after; that he wanted to put a boat shop there; that he cleared the lot, built a house on it and built a boat shop and a float on the tide lands below the bank—on the strip in dispute; that he

lived in the house and occupied and used the boat shop and float for about eighteen years; that Novak lived in the next block all of the time; that the defendants never said anything to the witness about getting off the tide lands. The nearest approach that Patrick made to any actual claim of ownership of the tide land strip is found in the following, which we quote from his testimony as set out in the abstract:

"Q. When you took possession of that did you claim to own that out to the water there, to the government line? A. I suppose I did, yes, sir. Q. All the time you were in possession of this property there, Mr. Patrick, you claimed to own it, did you? A. I did. Q. Did you speak to people around there about your ownership of that property? Did you ever say anything to anybody about it? A. I don't think so. I don't remember that I did. I sold the property to Mr. Curtis; he lives at Gig Harbor. He took possession of the property and lived there a year or two. Q. Do you know, Mr. Patrick, whether Mr. Curtis, when he took possession there, took possession of all the property down to the meander line that you sold to him? A. I suppose he did, yes, sir. I suppose he took possession of all the property I sold to him. Q. Now, when you sold to Mr. Curtis, what did you sell to him? A. Why, I sold that lot 4; the same property I bought from Novak. . . . Q. At the time you bought there, Mr. Patrick, was there any other line there excepting the government meander line that you knew anything about? A. I didn't know of any other line; I didn't know there was a meander line; I didn't know anything about the meander line; I supposed I bought to high water or bought out to the water. Q. At the time you bought, you didn't know about any line excepting the water line? A. No, sir. Q. Now, what do you mean there by the 'water line,' Mr. Patrick? A. Well, I meant where the high tide generally comes, or about there. Q. Where the high tide comes? A. Yes, sir. Q. Then, you refer to the water line there, and where you thought you were buying to, you mean the high tide line? A. Yes, sir; I thought I bought all above the water. Q. All above the water; that includes—you mean that includes within where you had your boat shop? A. No; my boat shop was outside of that altogether. Q. When you built there, Mr. Patrick, you built it there, claim-

ing that that was your property, did you? A. Why, I supposed that all in front of me was my own at that time. I didn't know—as to the tide lands I didn't know where they came to, or I didn't know where the meander line was. Q. During these eighteen years there was nothing occurred that made you change your mind, was there? A. No, sir. . . . I bought for the purpose of having a shop there and building boats. I supposed it was all mine. I would not have bought the lot unless I could have got the water. Q. When you were talking with Mr. Skansi about selling the property to him, did you say anything to him (Mr. Skansi) about how far he would own if he bought? A. No; I think not."

On cross-examination, he testified that the house he built to live in was on the bank, fifty or sixty feet above the shore line, and qualified his former answers as follows:

"Q. (by Mr. Nichols). Isn't it a fact that in buying that land to reach to the water, you bought down to the water and you thought all the tide lands belonged to the government and if you had a lot abutting on the water, anybody could build a float or wharf or anything else they wanted to, and that is the reason you thought you would have the use of the tide lands, isn't it? A. Yes; I supposed that if I owned the property above, I supposed I had the right to the tide lands, that is what I supposed. Q. What you were buying from John, was down to the water? A. Yes, sir."

On October 15, 1907, Patrick and wife sold and conveyed the lot to one Curtis and wife and by the following description:

"Lot four (4) of block two (2) town of Millville, according to the recorded plat thereof on file in the auditor's office of Pierce county, Washington."

At that time, Patrick removed his boat shop and float. Since then, the strip in controversy has not been used by any one except as a boat landing with a small impermanent float.

Curtis testified that he made the purchase through Magoon, Patrick's agent, and never talked with Patrick about

it. When asked what conversation he had with Magoon he answered:

"I asked him about the house; he said there was no underpinning under it. I asked him how much land there was to it; he said there was supposed to be fifty by two hundred seventy, I think five, or something like that. I never measured it or saw it measured. He said, 'Whatever the deed calls for is yours.'"

These figures are approximately the same as the measurements of the lot as shown upon the recorded plat. Magoon also told Curtis that, so far as he knew, the lot ran to the meander line.

On September 3, 1909, Curtis and wife sold and conveyed the lot to the plaintiff Peter Skansi by the same description as that contained in the deed from Patrick to Curtis. Curtis further testified that he never made any representation to Skansi as to how far the lot extended.

Peter Skansi testified that Curtis never lived on the lot but "rented it to a storekeeper;" that he, Skansi, bought the property through Magoon as the agent of Curtis; that he had no talk with Magoon except as to the price; that he thought he was buying lot 4, block 2 "down to the government meander line;" that he did not take possession but has continued to rent the property; that neither he nor the tenant ever used the tide land strip in controversy, "but I always took it as mine." He testified that Patrick's boat shop extended thirty or forty feet over the tide land and the float still further.

The foregoing is the full purport of the relevant testimony introduced on behalf of the plaintiffs. It is true that three or four other witnesses who had bought other lots from the defendants testified that the defendants represented to them that their lots extended to the meander line. However potently probative such evidence might be as tending to establish an estoppel, on the one hand, and an adverse holding on the other, were the suit between these witnesses

and the defendants, this evidence was palpably impertinent to any issue between the parties here. It was admitted that no such representations were made, either to the plaintiffs or to any one through whom the plaintiffs claim.

The defendant John Novak testified that he had never said anything to the plaintiffs about his ownership of the land in front of lot 4, until he had a survey made about three months before the commencement of this action; that he then advised the plaintiffs that the defendants owned the strip along the beach; that, when Patrick built his boat shop, the witness thought it was on Patrick's property; that the shop extended out onto the strip here in question only fifteen or eighteen feet.

The court made no formal findings but in his oral decision expressed the opinion that the plaintiffs had established title to the tide land in controversy by adverse possession. The decree went accordingly. The defendants appeal.

It is conceded that the title of the appellants is good unless the respondents' claim of adverse possession shall prevail. This is the sole question presented for determination.

The issue is further simplified by the fact that the respondents can claim no title by adverse possession under the seven-year statute with payment of taxes. Rem. & Bal. Code, §§ 786, 788 (P. C. 81 §§ 1373, 1377). There was no evidence whatever that the respondents or their grantors ever paid any taxes on the tide land strip here in question. Even if there were such evidence, it would be ineffectual to establish title, since it would lack the requisite support of a paper title. *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295; *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073; *Snell v. Stelling*, 83 Wash. 248, 145 Pac. 466.

The burden was upon the respondents to establish an adverse possession for more than ten years. Rem. & Bal. Code, § 156 (P. C. 81 § 53). Possession, to be adverse,

must be actual and uninterrupted, open and notorious, hostile and exclusive, and under a claim of right made in good faith. To constitute title it must have continued for the entire statutory period.

"To constitute an adverse possession there must be not only an ouster of the real owner, followed by an actual, notorious, and continuous possession on the part of the claimant, during the statutory period, but there must have existed an intention on his part, for a like period, to claim in hostility to the title of the real owner." *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982.

See, also, *Scheller v. Pierce County*, 55 Wash. 298, 104 Pac. 277.

Color of title is not an essential to adverse possession under the ten-year statute, but a claim of right made in good faith is always an essential, where there is no color of title. Mere naked possession is not sufficient. *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330; *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295; *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803; *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851; *Lohse v. Burch*, 42 Wash. 156, 84 Pac. 722; *Ramsey v. Wilson*, 52 Wash. 111, 100 Pac. 177.

While adverse possession may originate in a mistake it must be such a mistake as to lead to an unequivocal claim, either by acts or words, of a title or right to the land possessed. Mere possession up to the mistaken line without any claim of right or ownership beyond the true line is insufficient to constitute adverse possession or to work a disseizin of the true owner. *Wilcox v. Smith, supra; Milbank v. Rowland*, 63 Wash. 519, 115 Pac. 1053.

It is now the settled law of this state that an entry on and possession of land, under the mistaken belief that it is public land, will not have the effect of disseizing the true owner. Such possession is subservient to the public right; hence it is not hostile or adverse to the true owner. *McNaught-Collins Imp. Co. v. May*, 52 Wash. 632, 101 Pac.

237; *Ramsey v. Wilson* and *Yesler Estate v. Holmes, supra; Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574, 130 Am. St. 1112; *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650. The cases of *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914, and *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199, in so far as they hold the contrary, were distinctly overruled by the *McNaught-Collins Improvement Co.* case and the *Sturtevant* case.

Measured by these principles, the evidence signally failed to establish the respondents' claim of title by adverse possession. It is clear that, if such a title was ever initiated or created, it was through Patrick's possession alone. The evidence shows no other actual possession than his, and no other use of the tide lands save the placing there of a small float. It does not definitely appear that even this was done or authorized by the respondents. Patrick's possession was not adverse to the true title. His testimony makes it clear that he never claimed to own further than "to the water." Whenever the form of the questions made him seem to say that he claimed to the meander line, he immediately returned to his first assertion that he did not know there was a meander line and that he supposed he bought "to high water or bought out to the water." Finally he made it too clear for doubt that he only claimed to the line of high tide. When asked what he meant by the water line, he said: "Well I meant to where the high tide generally comes, or about there," and, "My boat shop was outside of that altogether." On cross-examination he also made it clear that he supposed the tide land belonged to the government and that he supposed that, because he owned the property above, he had the right to the tide land, but that he never thought he bought it from the appellant Novak.

This case is clearly ruled by the case of *McNaught-Collins Improvement Co. v. May, supra*, and the other decisions cited in connection with it. To hold otherwise would

be to return to the doctrine of *Johnson v. Conner*, which has been several times discredited and twice overruled in terms.

The respondents place their reliance, in the main, upon the decisions in *McCormick v. Sorenson*, 58 Wash. 107, 107 Pac. 1055, 137 Am. St. 1047; *Naher v. Farmer*, 60 Wash. 600, 111 Pac. 768; and *Wissinger v. Reed*, 69 Wash. 684, 125 Pac. 1030. In the light of the foregoing well established principles, these cases are so readily distinguishable from the case before us on the facts as to render a review of them a bootless task.

The judgment is reversed, with direction to dismiss the action.

MORRIS, C. J., FULLERTON, MAIN, and CROW, JJ. concur.

[No. 12488. Department One. February 5, 1915.]

RUFUS PACKWOOD *et al.*, *Respondents*, v. MENDOTA COAL & COKE COMPANY *et al.*, *Appellants*.[1]

WATERS AND WATER COURSES—POLLUTION—RIPARIAN RIGHTS—DOMESTIC USE. An upper riparian owner, a coal mining company, has no right to use the waters of a stream for washing coal and turn the water back into the stream polluted with foreign substances rendering it unfit for domestic and farm purposes, thereby causing substantial damages to a lower riparian owner entitled to the use of the stream in its natural purity for agricultural and domestic purposes and watering stock.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Reversible error cannot be claimed in the admission of relevant testimony as to one of the defendant's acts in polluting a stream, of which there was insufficient evidence to support that item of the complaint, which was practically abandoned; there being no motion made to exclude the evidence, and no requests for instructions thereon.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered June 22, 1914, upon the verdict of

[1]Reported in 146 Pac. 163.

a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Dysart & Ellsbury and *C. D. Cunningham*, for appellants.
Forney & Ponder, for respondents.

PARKER, J.—The plaintiffs seek recovery of damages which they claim resulted from the pollution of a natural stream of water running through their farm, by the unlawful acts of the defendants. Trial before the court and a jury resulted in verdict and judgment in favor of the plaintiffs for the sum of $1,000, from which the defendants have appealed.

Respondents have been, for some forty years past, the owners of a farm in Lewis county, which in recent years they have developed into a valuable dairy farm, and through which flows a natural stream of water, known as Packwood creek. The water flowing in this stream is by nature pure and fresh, well suited for domestic and farm purposes, and especially for watering stock of all kinds. It has a continuous flow at all seasons of the year, and in its natural state of purity, adds materially to the value of respondent's farm. Appellant Mendota Coal & Coke Company, hereinafter called the company, has, since the year 1910, owned and operated a coal mine near Packwood creek, some two miles above respondents' farm. Appellant Johnson has had the active management of the company's mine during the whole of this period. In preparing the coal for market, the company washes it by the use of water taken from Packwood creek, which, after flowing through the washing machinery, flows back into the stream, carrying with it quantities of fine coal, rendering, as the evidence tends to show, the water flowing in the stream through respondents' farm unfit for domestic and farm purposes, and especially unfit for watering stock, which is its principal value to respondents. In the operation of its mine, the company main-

tains some fifty dwelling houses for its employees, from which the sewage is drained to cesspools situated a short distance from the banks of Packwood creek. This is also alleged by respondents in their complaint to contribute to the pollution of the water of the stream flowing through their farm. The company is the owner of the land upon which its mine and washing machine and dwelling houses are situated, and by virtue of the ownership of that land, has riparian rights in the water of Packwood creek equal with the riparian rights of respondents.

Contention is made by counsel for appellants that the evidence is not sufficient to sustain the verdict and judgment, and that, in any event, the verdict is excessive. After a careful review of all the evidence in the record before us, we have reached the conclusion that neither of these contentions can be sustained. We do not feel called upon to analyze the evidence here. We deem it sufficient to say that we are satisfied that the evidence is ample to sustain the conclusion that respondents were damaged in the sum of $1,000 by the pollution of the waters of the creek from the washing of the coal, though the evidence is not free from conflict upon that question. The evidence tending to show damage from the maintenance of cesspools in connection with the dwelling houses of the employees of the company, it must be conceded, is not at all convincing, even assuming that it is uncontradicted. This, however, would not warrant our interfering with the verdict upon the ground of insufficiency of the evidence, since the evidence of damage from the washing of the coal is sufficient to sustain the verdict. It may be here remarked that the record, read as a whole, renders it quite apparent that the principal damage claimed by respondents was that resulting from the washing of the coal, especially in that the water of the stream was thereby rendered unfit for stock watering purposes. This, we think, must have been equally apparent to the jury.

Several of the assignments of error made and relied upon by counsel for appellants challenge the ruling of the trial court in giving instructions and refusing to give others requested. Instructions requested by counsel for appellants rest upon the theory of the company's right to the reasonable use of the water of Packwood creek, even if the water should by such use become materially polluted and respondents substantially damaged thereby. The court gave to the jury, among others, the following instructions:

"I instruct you that although you find that the contamination or pollution complained of is not poisonous nor deleterious to stock or to human beings, nevertheless if it is of such nature as to render the water less fit for use for domestic, farm or dairy purposes, either by man or beast, then, in law, the said stream has been polluted and contaminated for which plaintiffs are entitled to recover damages, if they have suffered any damages, and if you find that defendants have done such acts as to render said stream less fit for such uses, your verdict must be for the plaintiff in such amount as you shall find that defendants have injured the plaintiffs in that respect."

This instruction is complained of as rendering appellants liable for even the slightest pollution of the water of Packwood creek, and thereby depriving the company of the reasonable use of the water as a riparian owner. It is possible there would be some merit in this contention if this instruction stood alone. It is, however, only a very general statement of the company's liability touching its right to the use of the water. It was followed by an instruction given to the jury by the court, as follows:

"It is indeed, the right of a riparian owner to have the water of a stream come to him in its natural purity and this rule is recognized as well as the right to have it flow to his land in its natural flow in volume but in reference to this as well as the air, it is not every interference with the water that imparts impurities that is actionable, but only such as impart to the water such impurities as substantially impair its value for the ordinary purposes of life and render it

measurably unfit for domestic purposes and thus impairs the comfortable or beneficial enjoyment of property in the vicinity. So even though you should find that the water of Packwood creek as it now flows is not as pure and wholesome as it was previous to the time the Mendota Coal and Coke Company commenced the operation of its mine at Mendota, yet if by the operation of that mine the defendants have not substantially or materially polluted the water of said Packwood creek then under the law your verdict must be for the defendants."

These instructions read together we think state the correct measure of the limit of the company's riparian right to the use of the water of Packwood creek in the light of respondents' equal riparian right therein, and in view of the fact that the company's use of the water was concededly not for domestic or farm purposes. Putting aside, for the moment, consideration of the possible pollution of the stream by cesspools maintained by the company, we are constrained to hold that, in view of the fact that the pollution of the water was caused, as the jury evidently found, from the washing of coal by the company, its liability for damages to respondents depends upon the extent of detriment to them from that cause. That is, if the acts of the company resulted in the pollution of the water of the stream flowing through respondents' farm to a substantial degree, and rendered it materially less suitable for domestic and farm purposes and they thereby suffered substantial damages, appellants became liable therefor; though this might not be the limit of the company's right to the use of the water as riparian owner were it putting the water to ordinary domestic and farm uses, under the law as announced by us in *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851, 26 L. R. A. (N. S.) 222, where we held, in effect, that the use of the water of a stream by a riparian owner for ordinary farm and domestic purposes, such as allowing his horses, cattle, and fowl free access thereto, was a reasonable use and did not render him liable in damages to a lower

riparian owner entitled to the use of the water for farm and domestic purposes, though such use rendered the water materially less pure to such lower riparian owner's substantial damage.

The use of the water of a stream for industrial or manufacturing purposes by a riparian owner, by which it is polluted with a foreign substance, we think is quite another matter, when it comes to testing such owner's right as against a lower riparian owner entitled to the use of the water for farm and domestic purposes. In such cases, at least, and possibly some others, we believe the law to be that the right to the reasonable use of water by a riparian owner for manufacturing or industrial purposes, resulting in the pollution of the water with foreign substances, is limited to the extent that such use must not *materially* pollute the water to the *substantial* damage of the lower riparian owner. This we think is the fair import of these instructions.

In *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723, in considering the alleged pollution of a stream by a manufacturing plant, Chief Justice Redfield, speaking for the court, said:

"The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit, which might be of no account in some streams, might seriously affect the usefulness of others. So, too, a kind of deposit, which would affect one stream seriously, would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously; and some, by reason of their vicinity to a numerous population, become so offensive and destructive

of comfort, and health even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water, must submit to small inconveniences to afford a disproportionate advantage to others. It seems to us that this question of the reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts."

These observations of the learned Chief Justice are quoted with approval in the text of 2 Cooley, Torts (3d ed.), p. 1216.

In *Merrifield v. Lombard*, 13 Allen 16, 90 Am. Dec. 172, Chief Justice Bigelow, considering the alleged pollution of a stream by a manufacturing plant, observed:

"The law requires of a party through whose land a natural watercourse passes that he should use the water in such manner as not to destroy, impair or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water."

In *Day v. Louisville Coal & Coke Co.*, 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167, there was involved the pollution of a stream by the casting of coal and coke refuse

from a mine and coke ovens in and near the water of a stream to the damage of a lower riparian owner of farm lands bordering thereon, rendering the water "unfit for agricultural and domestic purposes." Discussing the company's claimed right to make such use of the stream by virtue of its riparian ownership, Justice Branon very pertinently observed:

"This case involves principles very important everywhere, but especially important in this state at present and in the future; but these principles are old and have been called into requisition through many, many years in actions for the pollution of streams, and casting into them hurtful things, and depositing them upon lands of riparian owners on the stream below. The defendant contends that as it was using its property in carrying on a lawful business very useful to the public it is exempt from liability, as it was only exercising its rights. We are told by the able brief of the defendant's counsel that the affirmance of this judgment will be vastly hurtful and disastrous to the mining and coke interests of West Virginia, and have a tendency to detract from the value of our land, and hinder the development of the great wealth of coal and iron in the bowels of our mountains, and will be subversive of great public policy, which demands the development of our wealth therein, and tends to the weal of the whole people of the state; and that a few individuals injured thereby must be without redress. We cannot accede to this broad proposition. The established maxim of centuries is *Sic utere tuo ut alienum non laedas* (so use your own property that you do not injure another). That rule is almost equal to the Golden Rule in importance, and must never be lost sight of in the daily doings and transactions of organized society. A man has land upon a stream. He is its sole lord. No one has a right to injure that land. It is protected by the Constitution. If one up the stream in his works, be they ever so lawful, honorable, and necessary for private weal or public weal, do thereby injure the land of that owner further down by unlawful invasion of it, by casting upon it things damaging it, or by polluting the purity of the water, rendering it unfit for the owner's consumption as it passes through his land, the man up the stream must

answer in damages. One man without fault is injured by another. That is enough for liability."

See, also, *Greene v. Nunnemacher*, 36 Wis. 50; *Tetherington v. Donk Bros. Coal & Coke Co.*, 232 Ill. 522, 83 N. E. 1048; *Bowman v. Humphrey*, 124 Iowa 744, 100 N. W. 854; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 79 Am. St. 643, 51 L. R. A. 687; *Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 100 S. W. 116, 9 L. R. A. (N. S.) 923; *Drake v. Lady Ensley Coal, I. & R. Co.*, 102 Ala. 501, 14 South. 749, 48 Am. St. 77, 24 L. R. A. 64, and note; *Young & Co. v. Bankier Distillery Co.*, A. C. 691 (Eng.) 1893.

It has been well said: "It is difficult, if not impossible, to declare a rule in language so clear and precise as that it can be applied with certainty to every case that may arise." *Tennessee Coal, Iron & R. Co. v. Herndon*, 100 Ala. 252, 14 South. 287, 46 Am. St. 48. We believe it safe, however, to say that, in the absence of rights resting upon prescription or custom, neither of which is here involved, there can be no more practical or just rule of liability resting upon riparian owners using the water of a stream for industrial or manufacturing purposes and thereby polluting the water with foreign substances, than that damages caused by such use and pollution of the water renders such user liable to a lower riparian owner entitled to use of the water for domestic and farm purposes whenever such damage is of a substantial nature. This of necessity results in the question being one for the jury, except in cases where the evidence is such as to leave no room for honest difference of opinion as to the substantial nature of the damage.

Our attention is called to the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453, 57 Am. Rep. 445, which counsel for appellants principally rely upon in support of their contentions in this branch of the case. That decision has received some criticism from the courts, both in this country and England. We think, however, it is, in any event, distinguishable from the case before us. The stream

involved in that case was polluted by the flow of water by gravity alone from a coal company's mine. As said at page 147 of the opinion:

"It is clear that for the consequence of this flow, which by the mere force of gravity, naturally, and without any default of the defendants, carried the water into the brook and thence to plaintiff's pond, there could be no responsibility as damage on the part of the defendants,"

and on page 155, it is said:

"The defendants introduced nothing into the water to corrupt it, the water flowed into Meadow Brook just as it was found in the mine. Its impurities were from natural and not from artificial causes."

The water was not taken from the stream, used in washing the coal and returned to the stream in a polluted condition carrying foreign substances as in this case. Even the Pennsylvania court in the later case of *Lentz v. Carnegie Bros. & Co.*, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. 717, disposed of a question similar to that here involved, upon a theory not materially out of harmony with our present conclusion.

Some contention is made by counsel for appellants against certain instructions given by the court to the jury which, it is contended, in effect permit the jury to ignore the evidence tending to show pollution of the stream from other sources than the company's mining plant. The instructions, as a whole, however, we think render it quite clear that the jury were plainly given to understand that appellants were to be held liable only for their own acts and to the extent of the damage attributable thereto.

It is contended that the trial court erred in the admission of evidence over objections of counsel for appellants tending to show the maintenance of cesspools in connection with the dwellings of the company's employees near the stream. We have noticed that this was one of the claimed causes of the pollution of the stream alleged in respondents' com-

plaint. It seems to us that the objection to this evidence goes only to its weight and therefore that its admission must rest largely in the discretion of the trial court. Evidence is not inadmissible merely because it does not within itself prove all that the party offering it is contending for as to the particular item of damage claimed. We are not able to see that the evidence was irrelevant at the time it was offered, though we must confess that, if respondents' right of recovery rested alone upon their claimed pollution of the stream from this source, appellants probably would have been entitled to a nonsuit. However, we do not find in the record any motion to exclude this evidence from the consideration of the jury made after its admission, nor do we find any request for instructions touching the consideration of this evidence by the jury. Upon the whole record, we are not able to see that any error has been committed in this regard which counsel for appellants can now complain of. It is apparent from the record before us, viewed as a whole, that this claim of pollution of the stream was all but lost sight of in the trial of the case and it is hard to believe that it had any influence upon the minds of the jury as a contributing cause of the pollution of the stream. Upon the whole record, we do not feel warranted in disturbing the judgment upon this ground.

We conclude that the record is free from prejudicial errors and that the judgment must be affirmed. It is so ordered.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 12561. Department One. February 5, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Harry Syverson, Plaintiff*, v. T. C. FOSTER, *as Sheriff of Lewis County, Respondent.*[1]

BAIL—RIGHT TO—CONSTITUTIONAL LAW—ARREST FOR DEBT—APPEAL. A judgment debtor in a civil action, arrested on a personal execution, who appealed from the order denying his motion to vacate the order of arrest, is entitled to be admitted to bail pending the appeal, where the right to execute the judgment by arrest was questioned under Const., art. 1, § 17, providing that there shall be no imprisonment for debt except in cases of absconding debtors.

SAME—RIGHT TO BAIL—CONSTITUTIONAL PROVISIONS. In such cases, the right to admission to bail pending appeal does not depend on statutory provisions, since the right of personal liberty is a natural right, of which the right to habeas corpus is guaranteed by the constitution, as is the right of appeal with all its incidents and privileges.

HABEAS CORPUS—TO ADMIT TO BAIL—INHERENT POWERS OF COURT. As a writ of habeas corpus is an appropriate remedy in aid of bail, the supreme court has inherent power, sustained by the common law and the bill of rights, to grant a writ of habeas corpus to admit to bail pending appeal from an order to vacate an arrest, upon a disputed right affecting the personal liberty of the petitioner.

Application filed in the supreme court December 28, 1914, for a writ of *habeas corpus* to admit to bail a judgment debtor, held under an order of arrest entered by the superior court of Lewis county, Wright, J., entered September 21, 1914, pending appeal to the supreme court. Writ granted.

Hayden, Langhorne & Metzger and *Thacker & Hancock*, for petitioner.

G. E. Hamaker, for respondent.

CHADWICK, J.—On the 24th day of October, 1913, a judgment was rendered in the superior court for Lewis county, in favor of one Amy D. Bronson and against Harry Syverson. The action had been brought to recover damages

[1]Reported in 146 Pac. 169.

for an injury to the person of the plaintiff. The judgment remaining unsatisfied, plaintiff filed a petition *ex parte* and obtained from the judge presiding an order directing that an execution issue against the person of the defendant, the present petitioner, commanding the sheriff of Lewis county, or the sheriff of any other county in the state of Washington where the relator might be found, to arrest him and hold him until the judgment was paid or satisfied, or until he should be discharged according to law. Syverson appeared in the superior court, and in the original action, by motion to vacate the order of arrest for the following reasons:

"That the court has no jurisdiction in the matter to issue such order. . . .

"That the showing made on behalf of the plaintiff was insufficient to warrant it being granted.

"That said order is contrary to the laws of the state of Washington, and to article 1, section 17, of the constitution of the state of Washington. . . .

"That the warrant herein issued in this cause be vacated and quashed and the defendant discharged from the custody of the sheriff of Lewis county, Washington, for the following reasons: That the order does not state or fix the amount of any bond, as provided by the statute, to be given on behalf of plaintiff suing out the warrant, . . . and that said order does not fix the amount of bail in which the defendant shall be held, as provided by law."

The motion was brought on regularly for hearing, and was overruled by the court. An order reaffirming the former order of arrest was entered. Petitioner was thereupon recommitted to the custody of the sheriff and is now held by him. A subsequent motion for bail was made and denied by the court. Whereupon the defendant filed a petition praying for a writ of *habeas corpus*. This petition was also denied. Petitioner then filed a petition for a like writ in this court.

It is recited in the brief of the petitioner, and is not denied by respondent, although it does not appear in the transcript, that an appeal was taken from the order of the court deny-

ing the motion of the petitioner to vacate the order of arrest. The prayer of the petition in this court is for an order fixing bail pending a hearing and determination of the appeal.

It is contended by the respondent that, inasmuch as the relator is held for an injury to the person of the party plaintiff (Rem. & Bal. Code, § 749 [P. C. 81 § 309]), and which judgment is subject to execution under Rem. & Bal. Code, § 516 (P. C. 81 § 835), the petitioner is held "under a warrant or judgment of a court of competent jurisdiction," and that the cause of his detention will not be inquired into; that he has no remedy and cannot release himself from the penalties imposed by law in the execution of the judgment pending an appeal unless he gives a supersedeas bond as in a civil action. From the argument of counsel, we understand this to have been the opinion of the trial judge also.

Without going into the merits of the case or inquiring into the right of a party to invoke the aid of the sections of the statute just referred to, we think that, so long as the right of the plaintiff in the original action to execute a judgment by process against the person of the petitioner by imprisonment pending the payment of her judgment is questioned, under § 17, art. 1, of the constitution of the state, it follows, as a matter of course, that bail should be taken. The constitution is sweeping in its terms. It says: "There shall be no imprisonment for debt except in cases of absconding debtors." It will be admitted that a very serious question of law has been raised by the petitioner.

The statute is silent as to the right of bail pending an appeal, where the person of the debtor is held in satisfaction of an execution, and no cases are cited by counsel on either side. They say none can be found, and a hurried search by the writer of this opinion confirms the assurance of counsel, but it does not follow that there is no law to cover the case. A more frequent reference to fundamental principles would make for better law and save much time and energy wasted in reading, approving, discussing, distinguishing, or reject-

ing cases from the great mass of judicial opinions to be found in the published reports.

"Case law is fast becoming the great bane of the bench and bar. Our old-time great thinkers and profound reasoners who conspicuously honored and distinguished our jurisprudence have been succeeded very largely by an industrious, painstaking, far-searching army of sleuths, of the type of Sherlock Holmes, hunting some precedent in some case, confidently assured that if the search be long enough and far enough some apparently parallel case may be found to justify even the most absurd and ridiculous contention." *State v. Rose*, 106 N. E. (Ohio St.) 50.

The right of personal liberty "is a right strictly natural" of which the right to have a writ of *habeas corpus* to bring the body of one detained before a court of competent jurisdiction to inquire into the cause and nature of the commitment or detention is a guaranteed remedy.

"Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I., it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16, Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person or by

warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain." 1 Blackstone's Commentaries, 134, 135.

This principle has been carried into our constitutions.

"The privilege of the writ of *habeas corpus* shall not be suspended, unless in cases of rebellion or invasion the public safety may require it." Const., United States, art. 1, § 9; Const., State of Washington, art. 1, § 13.

The writ of *habeas corpus* is an appropriate and proper remedy in aid of bail. But it is contended that petitioner is held under a final judgment and process of a court of competent jurisdiction and that this court will not inquire into the legality of such judgment and process by resort to an extraordinary writ. Rem. & Bal. Code, § 1075 (P. C. 81 § 1699); *In re Newcomb*, 56 Wash. 395, 105 Pac. 1042.

But it does not follow that courts will deny a resort to the writ where it is invoked in aid of bail pending a hearing upon a disputed right affecting the personal liberty of the petitioner. While our constitution, art. 1, § 20, refers in terms to parties charged with crime, we think, nevertheless, that there is an inherent power in the courts, sustained by reference to the doctrines of the common law and the guarantees of the bill of rights, art. 1 of our constitution, to grant bail in all proceedings pending a final hearing and determination of the merit of the controversy. The constitution, art. 1, § 22, guarantees the right of appeal. That guarantee includes every incident and every privilege attending the right. While there seem to be no cases in point, having established the principle, it is not difficult to follow it into the adjudged cases. We will not pursue it further than to refer to the case of *Packenham v. Reed*, 37 Wash. 258, 79 Pac. 786. In that case there was an original application for a writ of *habeas corpus* to admit to bail. The petitioner had

been committed to the reform school of the state of Washington until he should attain the age of eighteen years, or until he should otherwise be regularly discharged therefrom. Thereafter, he gave notice of appeal. Bail was denied pending the hearing on appeal. The principal contention of the respondent, the superintendent of the reform school, was that there was no law or statute authorizing bail pending an appeal in such cases. After noting the fact that this court had always given a liberal construction to statutes granting a stay of proceedings on judgments pending appeals, the court said that it had no doubt that an infant has a right of appeal when committed to the reform school, and incidentally a right to be admitted to bail pending such appeal.

"The writ may be had for the purpose of admitting a prisoner to bail in civil and criminal actions." Rem. & Bal. Code, § 1077 (P. C. 81 § 1703).

The court found this section to be declaratory of the common law and that *habeas corpus* is an appropriate remedy under it. In answering the contention that there was no statute authorizing bail, the court said:

"So far as our investigations have led us, we have found no case where jurisdiction to admit to bail by *habeas corpus* has been denied, in the absence of a statute limiting the power of the court in that regard."

If it be said that an infant committed to the state training school is held under criminal process and has a right to be admitted to bail without reference to the statute, under art. 1, § 20, of the constitution, the answer is that the law under which infants are detained and confined in reform schools and houses of correction are not criminal statutes. *Weber v. Doust, post* p. 330, 146 Pac. 623; *In re Powell*, 6 Okl. Cr. 495; *In re Watson*, 157 N. C. 340, 72 S. E. 1049; *Ex parte Ah Peen*, 51 Cal. 280; *Reynolds v. Howe*, 51 Conn. 472; *In re Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; *State ex rel. Caillouet v. Marmauget*, 111 La. 225, 35 South. 529; *Mill v. Brown*, 31 Utah 473, 88 Pac. 609,

120 Am. St. 935; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914 A. 1222, 45 L. R. A. (N. S.) 908. In principle, the case of *Packenham v. Reed*, above referred to, is broad enough to cover and sustain the right of the relator to demand and have bail fixed in this case.

It was suggested at the time of oral argument that, in the event this court issued the writ, that bail should be fixed in a sum greater than that fixed at the time the order to show cause was issued, to wit, $3,000. That sum seems ample, in the absence of a positive showing that it is probably insufficient to insure the presence of the defendant when his case is finally disposed of on appeal.

The writ will issue.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 12274. Department One. February 6, 1915.]

E. J. BOYCE, *as Hoquiam Retail Lumber Office, Appellant*, v. A. M. CAMPBELL, *as Receiver etc., Respondent*.[1]

CORPORATIONS—REPRESENTATION—AGENTS—CONTRACTS—AUTHORITY OF AGENT. A trust company authorized a director to incur certain expenses in the alteration of certain portions of its building, and is liable therefor, where it appears that, at a meeting of the board, the director was requested to present plans and an estimate of the cost, and when this was done about two weeks later, at another meeting, he was authorized to go ahead, the trust company assuming the expense, which it approved and paid in excess of the estimates, and the only action taken with reference to a demand for the balance was to postpone action until a day certain, no denial of liability being made prior to the appointment of a receiver; and it is immaterial that the director had a lease of other portions of the building for hotel purposes, the alterations in question relating to portions of the building not leased to him.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 17, 1914, upon findings

[1]Reported in 146 Pac. 158.

in favor of the defendant, in an action on contract, tried to the court. Reversed.

Morgan & Brewer, for appellant.

C. W. Hodgdon, for respondent.

MORRIS, C. J.—Action to recover the balance claimed as due upon a purchase of lumber, used in alterations to the building known as the Hotel Grayport, at Hoquiam. The Hoquiam Trust Company, the owner of the building, went into the hands of a receiver in November, 1912. The lumber was furnished between February 2, 1912, and March 27, 1912. The defense established by the judgment below was that the indebtedness was not created by the trust company, nor chargeable to it but was an indebtedness of C. J. Sims the lessee of the hotel. Sims became a majority stockholder and director in the trust company in December, 1911, and under a resolution adopted December 11, 1911, he entered into possession of the hotel. On February 6, 1912, the directors of the trust company, after discussing the necessity for alterations to the store rooms upon the ground floor of the hotel building so as to make them more attractive to prospective tenants, authorized Sims to submit plans and an estimate of the cost at an adjourned meeting. This adjourned meeting was held on February 19th. The minutes of this meeting show it was then determined to "assume payment of the necessary expenses of bringing forward the fronts, putting in partitions . . . at a price not to exceed $1,150." Sims went ahead with the alterations agreed upon, obtaining lumber from the appellant, and incurring an indebtedness of $485.05. The account was charged to E. J. Sims, both Sims and appellant explaining this charge by saying that, at the time the account was opened, it was specified it was for the trust company.

Monthly statements were made out and sent to Sims. These bills were held by Sims until the indebtedness had been nearly

completed, when he took them and delivered them to the respondent at its office. In making the alterations, unforeseen conditions were met with increasing the cost to over $1,900, which amount was paid by the trust company under the resolution of February 19th, upon orders from Sims, including two payments on this lumber account amounting to $134.56. On November 11, 1912, the minutes of the trust company show the following recitals:

"Hoquiam Retail Lumber Company Office bill for balance was presented to the board, but after some discussion the matter was, on motion duly made, seconded and carried by vote of all present, laid on the table until after the 16th day of November, 1912."

Nothing further was done, however, and on November 30th the receiver took charge of the trust company and repudiated the claim.

The responsibility for this indebtedness depends upon whether or not Sims was acting for the trust company under due authorization. It seems to us this is determined in favor of appellants by the action of the trust company, as shown by its minutes of the meetings of February 6th and February 19th. After discussing the advisability of these alterations at the first meeting, Sims was requested to present plans and an estimate of the cost. When this was done he was, at the second meeting, authorized to go ahead, the trust company assuming payment of the necessary expenses which were estimated not to exceed $1,150. That the trust company considered itself the real debtor and bound to pay these bills, is manifest by the fact that it did pay them to the extent of approximately $1,900, including two payments aggregating $134.56 on this account. The last action taken by the trust company in regard to this indebtedness, prior to the appointment of the receiver, was to defer taking action on appellant's demand for payment "until after the 16th day of November, 1912." Even then, there is no repudiation

of the indebtedness, nor denial of the liability. The lower court first held with the appellant, holding that the evidence established that Sims was acting as the representative of the trust company in the purchase of this lumber. Subsequently, upon the consideration of the resolution of December 11, 1911, it was considered that the liability attached to Sims alone. This resolution is as follows:

"On motion duly made by Adams and seconded by Heath, it was voted by unanimous vote of those present, except Sims, as follows: That C. J. Sims be given a lease of the Grayport Hotel property so-called, including building and the furniture and fixtures therein for the term of three months commencing this day, on the following conditions: At a rental of $1 a month with option to take a lease for a series of years, not exceeding five at the end of said three months, at a reasonable rent to be agreed upon by the parties at that time, but if at the end of three months the said Sims shall see fit not to take a lease for a further period, any property that may have been added by him to the hotel outside of his own personal property brought in for the use of himself and family, shall become the property of the said Trust Company and in the event that the said Sims shall lease for a term of years, he shall buy the personal property in the hotel, belonging to the Trust Company which includes, furniture, fixtures, etc., at a price to be at that time agreed upon."

We can see no materiality in this resolution as to the account now before us. Under it Sims made alterations in the hotel portion of the building aggregating $2,000, which he personally assumed. The alterations in question covered by the minutes of February 6th and 19th did not make any changes in the part of the building devoted to hotel purposes, but consisted in bringing out and altering the fronts of the store rooms, with the exception of a barber shop which was provided for out of the hotel lobby. All rent from these store rooms was turned over to the trust company, and it is evident that they were not considered as a part of the building leased to Sims, at least so far as the income derived from the rentals.

Judgment reversed, and cause remanded with instructions to enter judgment as prayed for.

MOUNT, HOLCOMB, CHADWICK, and PARKER, JJ., concur.

[No. 12208. Department One. February 8, 1915.]

C. E. COOK *et al.*, *Respondents*, v. WASHINGTON-OREGON CORPORATION, *Appellant*.[1]

APPEAL—REVIEW—OBJECTIONS NOT URGED BELOW—AMENDMENTS. In an action to foreclose a laborer's lien, an objection that the record does not show that any copy of the lien notice was served as required by law, comes too late when first made on the hearing of the appeal, Rem. & Bal. Code, § 1752, requiring the supreme court to disregard any defect in the pleadings that might have been cured by amendment, and fairness to counsel and the court requiring that the point be urged in the court below and in appellant's brief on appeal.

APPEAL—REVIEW—ABSENCE OF FINDINGS—PRESUMPTIONS. No findings of fact being necessary in an equity case, incomplete findings are not ground for reversal, and the correctness of the judgment will be presumed, in the absence of a statement of facts or any affirmative showing in the record of prejudicial error.

MASTER AND SERVANT—LIENS FOR LABOR—ON OPERATING PROPERTY IN POSSESSION OF LESSEE—INTERESTS SUBJECT. Under Rem. & Bal. Code, § 1149, giving a lien to any person performing labor for any person or corporation operating specified property (including mines), upon all the real and personal operating property thereof, the lien is confined to the interests of a lessee of a mine, in possession and holding also under a conditional sales contract, where the lessee employed the lien claimants, none of whom performed labor for the owner and lessor.

SALES—CONDITIONAL SALES—FILING—NECESSITY—LIENORS OR SUBSEQUENT CREDITORS. Where a conditional sales contract of the personal property used in operating a mine was not filed in the auditor's office within ten days after taking possession, it is, under Rem. & Bal. Code, § 3670, deemed to be an absolute sale as to subsequent creditors, which include subsequent claimants for liens for labor performed in the operation of the mine.

[1]Reported in 146 Pac. 156; 149 Pac. 325.

MASTER AND SERVANT—LIENS FOR LABOR—PROPERTY SUBJECT—REAL OR PERSONAL PROPERTY—DECREE. Motors, pumps, railroad rails, coal cars, a mule, and a blacksmith's outfit, used in operating a coal mine, are to be classed as personal property in a decree establishing labor liens; while bunkers and all necessary wiring are to be classed as real property; but "other equipment about the mine" is too general a designation to be sufficient in an involuntary lien, without other specific designation in the decree establishing the lien, where it was found that only the personal property was subject to the lien.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 2, 1914, upon findings in favor of the plaintiffs, in an action to foreclose labor liens. Modified.

Forney & Ponder, *Charles A. Johns*, and *Hayden, Langhorne & Metzger*, for appellant.

Albers & Allen, for respondents.

HOLCOMB, J.—This is an action brought to foreclose certain labor liens on the mining machinery, equipment, and material used in and about the operation of a certain coal mine, which was leased by appellant, Washington-Oregon Corporation, to the defendant Snyder, on November 12, 1912. The liens are claimed and filed and this action brought under Rem. & Bal. Code, § 1149 (P. C. 309 § 117), which is as follows:

"Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien."

The lease to Snyder also contained a conditional right to purchase the mining machinery, equipment, and material used in and about the operation of said mine from the appellant. Under said lease and conditional sale contract, Snyder took possession of said mine and machinery and equipment, and proceeded to operate the mine until about April 4, 1913. The lease and conditional sale contract was filed in the office of the county auditor of Lewis county January 28, 1913, more than ten days after its execution. During the time Snyder was operating the mine, he became indebted to the plaintiffs herein, and to other laborers who assigned their claims to plaintiffs (respondents) before the commencement of the action, for labor performed in the operation of the mine in the sum of $1,527.14, as found by the court. Defendant Snyder abandoned the mine on April 4, 1913, failed to pay the laborers, and left the state, and appellant reentered and took possession of the mine and equipment as of its former estate.

No statement of facts was filed within the statutory time, and the questions presented must be governed by the pleadings, findings of fact, conclusions of law and judgment of the trial court.

Appellant urges upon appeal that the record does not show that any copy of the lien notice was served upon appellant, or upon the defendant Snyder. The record before us is silent as to that requirement of the lien statute governing this case, Rem. & Bal. Code, § 1150 (P. C. 309 § 119). The objection, however, comes too late. It was urged for the first time, so far as we can determine, at the time of the hearing of the case on appeal in this court. The complaint alleged the service of a copy of the lien notice upon appellant, and was silent as to service of any copy of the lien notice upon defendant Snyder. It is true, appellant demurred to the complaint, and the demurrer was overruled. After trial in the court below, both respondents and appellant proposed findings of fact and conclusions of law. The court adopted

findings and conclusions in respondents' favor. The findings proposed by both parties were silent on the matter of the service of copy of lien notice upon either party. Waiving the question of whether or not appellant could take advantage of the failure of the lienors to serve the statutory copy of notice of lien upon the "employer," it is manifest that appellant did not urge the point in the court below. Appellant's opening brief on appeal does not raise the question. Fairness to the adverse party, and to the trial court, forbids any such dilatory practice. Had the point been urged to the court below, that court could, and doubtless would, have determined the matter properly. If the defect respecting defendant Snyder was jurisdictional as to the entire proceeding, it was such a matter as was amendable, if the facts so warranted, to show proper service of copy of lien notice. We have repeatedly held that:

"Where a case has proceeded to judgment, we will not consider any defect in the pleadings that might have been cured by amendment, but will, as admonished by Rem. & Bal. Code, § 1752 (P. C. 81 § 1255), decide the case on the merits, disregarding all technicalities, and consider all amendments which could have been made as made." *Yeisley v. Smith*, 82 Wash. 693, 144 Pac. 918; *Kelly v. Lum*, 75 Wash. 135, 134 Pac. 819, 49 L. R. A. (N. S.) 1151.

No findings of fact are necessary in an equity case. *Potvin v. Blasher*, 9 Wash. 460, 37 Pac. 710; *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003. Since no statement of facts is brought to us on appeal, the correctness of the judgment, at least so far as the facts are concerned, will be presumed, in the absence of any affirmative showing in the record of prejudicial error. *Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392; *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029; *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031. Incomplete or defective findings are not ground for reversal in an equity case, since no findings are necessary to support the decree. *Clambey v. Copland, supra.*

Under the law applicable to this case, however, the judgment cannot be sustained entirely, unless the property subject to the lien is real or personal property of Snyder, the employer. If real property, except as to the leasehold term, it belongs to appellant, for title to it never passed to Snyder.

Respondents' liens were claimed under Rem. & Bal. Code, § 1149 (P. C. 309 § 117), giving liens to "every person performing labor for any person, company, . . . on the franchise, earnings, and on all the real and personal property of said person . . . which is used in the operation of its business, to the extent of the moneys due him from such person . . . operating said franchise or business, for labor performed within six months next preceding the filing of his claim of lien therefor . . ." These lienors were employed by defendant Snyder, who was then the lessee of the mine, holding also a conditional right of purchase upon complying with certain terms and obligations of payment, which he did not perform. The appellant never employed the respondents, nor did they perform any labor for appellant. Defendant Snyder was in possession of the mine and the machinery and equipment used in operating the mine, from and after November 12, 1912, until April 4, 1913, during which period respondents performed the labor for which they claimed the liens. Snyder's real estate interest was his leasehold interest, including whatever was real property during that period. Respondents undoubtedly have a lien under the statute relied on upon all the personal property possessed by Snyder and used in the operation of the mine. Although appellant insists that the mining machinery and equipment were part of the realty to which appellant retained title, we cannot so consider it. The principal items of property were, one fifty-horse power motor; one five-horse power motor; four coal cars and haul cable; three pumps; one washing outfit and screen; about 1,400 feet of pipe; one set of blacksmith tools; one bay mule; the coal bunkers at the mine; one ton of railroad rails, and all necessary wiring and

other equipment about the mine. The trial court found that the motors, pumps, railroad rails, coal cars, mule, and blacksmith outfit, had been removed from the mine by appellant, and part of it removed from the state by appellant after the filing of the liens. If said property was personal property, Snyder being in possession under a conditional sale contract which was not filed for record within ten days after he was placed in possession thereof, under Rem. & Bal. Code, § 3670 (P. C. 349 § 35), the sale must be treated as absolute as to these lienors, who are subsequent creditors in good faith. *American Multigraph Sales Co. v. Jones*, 58 Wash. 619, 109 Pac. 108; *Worley v. Metropolitan Motor Car Co.*, 72 Wash. 243, 130 Pac. 107; *First Nat. Bank of Everett v. Wilcox*, 72 Wash. 473, 130 Pac. 756, 131 Pac. 203; *Chilberg v. Smith*, 174 Fed. 805.

Nor does the rule laid down in *Doe v. Tenino Coal & Iron Co.*, 43 Wash. 523, 86 Pac. 938, relied upon by appellant, defining certain classes of movable property as real estate for the purpose of taxation, sustain appellant's contention, for that decision rested upon the definitions of real and personal property for the purpose of assessment and taxation in the revenue and taxation statutes (Bal. Code, §§ 1656 and 1698; Rem. & Bal. Code, §§ 9092, 9112; P. C. 501 §§ 17, 113), and the earlier decision in *Eureka District Gold Min. Co. v. Ferry County*, 28 Wash. 250, 68 Pac. 727, where it was held that, when the property all belonged to the person or company assessed and "the items of personal property were so inconsiderable in amount as compared with the value of the real estate that they did not really enter into the estimate of valuation," it was not necessary to segregate them into classifications of real and personal property. If it be determined by actual conduct, as well as by constructive intent of the parties, what better evidence is there that the items of property in controversy were movable personal property, and so intended, than that they were actually removed from the mine by appellant, and a part of same removed to another

state? We consider said items to have been personal property as found by the trial court. The coal bunkers and "all the necessary wiring and other equipment about the mine," as expressed in the decree of foreclosure, seem to us to have the characteristics of real property, so far as the coal bunkers and wiring are concerned. They must surely be attached to and constitute structures and improvements on the real estate. "Other equipment" is too general and loose a designation to be sufficient in an involuntary lien without other specific designation. *Dexter Horton & Co. v. Wiley*, 2 Wash. 171, 25 Pac. 1071.

The decree will be modified to omit therefrom the lien and judgment against the coal bunkers, all necessary wiring, and other equipment about the mine. In all other respects, the judgment is affirmed. Respondent will recover costs.

MORRIS, C. J., PARKER, CHADWICK, and MOUNT, JJ., concur.

ON REHEARING.

[Decided June 15, 1915.]

PER CURIAM.—In this cause an opinion was filed on February 8, 1915. The remittitur was sent down on March 12, 1915. Thereafter, on April 29, 1915, respondents filed in this court a motion to recall the remittitur for the purpose of correcting the same in accordance with the opinion. The appellants filed an answer, conceding that the remittitur is erroneous and should be corrected. The remittitur sent down gave judgment against the appellants Washington-Oregon Corporation and Globe Indemnity Company, its surety, in favor of the respondents, for the total sum of $1,527.14, with interest from April 4, 1913, and "that the plaintiffs recover the further sum of $1,188.03, with interest thereon from January 2, 1914, until paid." This is erroneous and, diligent application having been made therefor, must be corrected.

Respondents are entitled to judgment in their several amounts against defendant Snyder and the liened chattels, omitting the coal bunkers, all necessary wiring, and other equipment, in the total sum of $1,527.14, with interest at the legal rate from April 4, 1913, and $104.10 allowed as costs, with interest at the legal rate from January 2, 1914.

Respondents are entitled to judgment against appellants Washington-Oregon Corporation and the Globe Indemnity Company, its surety, or either of them, for the total sum of $1,188.03 principal, attorney's fees, and costs of lien, together with costs of action, with interest thereon at the legal rate from April 4, 1913, as part of the aforesaid judgment for $1,527.14.

The remittitur will be corrected accordingly.

[No. 12213. Department One. February 8, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Puget Sound & Willapa Harbor Railway Company, Appellant*, v. HENRY FOSTER *et al., Respondents.*[1]

EMINENT DOMAIN—DAMAGES—ELEMENTS—ACCESS TO PUBLIC HIGHWAY. In condemnation proceedings for a railroad right of way through a farm, which crossed a public highway through the farm at such an acute angle as to deprive the owner of right of access to the public highway for a distance of 300 feet on either side of the point of intersection, the owner is entitled to the damages sustained by reason of this interference with his right of access to the highway.

SAME—DAMAGES—MEASURE OF DAMAGES. Instructions as a whole to the effect that the measure of damages for the condemnation of farm land by a railroad company is the depreciation in the market value of the remaining portion of the farm, in addition to the value of the portions taken, are not erroneous, although they may have been technically so in some few expressions, standing alone.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered April 2, 1914, upon the verdict of

[1]Reported in 146 Pac. 154.

a jury awarding damages in condemnation proceedings. Affirmed.

F. M. Dudley and *Gus L. Thacker*, for appellant.

Forney & Ponder, Dysart & Ellsbury, and *C. D. Cunningham*, for respondents.

PARKER, J.—This is an eminent domain proceeding wherein the plaintiff seeks to acquire a right of way across the farm of the defendants. A trial before the court and a jury resulted in verdict and judgment awarding to the defendants damages in the sum of $3,122, from which the plaintiff has appealed.

The respondents own a large and valuable farm in Lewis county, through which runs a county road in an easterly and westerly direction. Appellant has projected and seeks to acquire a right of way across respondents' farm in a northeasterly and southwesterly direction, crossing this county road at an acute angle near the center of respondents' farm. This, by reason of the angle at which the proposed right of way crosses the road, will deprive respondents of access from their land to the road for a distance of some three hundred feet on each side thereof, though they will continue to have access from their land to the road at other points at which their land borders thereon.

The principal contention of appellant, in substance, is that the trial court erred in allowing respondents to introduce evidence tending to show that they would be damaged by the crossing of the county road by appellant's right of way in this manner, and in giving to the jury instructions submitting to it, for consideration, this with other elements of damage to respondents' farm. This contention is rested upon the theory that the trial court's ruling in effect permitted the jury to award to respondents compensation for injury to the county road alone, which, if any, is an injury which the respondents share with the public generally, citing

and relying upon our decisions in *Smith v. St. Paul, Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, 70 L. R. A. 1018, and *Clute v. North Yakima & Valley R. Co.*, 62 Wash. 531, 114 Pac. 513. In the *Smith* decision, at page 362, it is said:

"It is urged that the excavations made through the cross-streets in respondents' neighborhood constituted an injury for which they are entitled to damages. We think not. If the railroad was constructed in the public street adjacent to respondents' lots, they would be entitled to recover whatever damages were occasioned thereby. This is upon the theory that every owner of property bordering upon the street has a right to access, light, and air therefrom, which right is an appurtenant to the land, and any physical impairment of that right is regarded as actionable. Such an injury is one peculiar to the land owner, and not shared in kind by others. But where the injury complained of is an obstruction, not adjacent to the land of the person in question, but to a street in the neighborhood which he uses, or might use, in common with the public in general, he has no right of action as an owner of injured property. That he may use the street more often than most or all others, makes a difference only in degree and not in character, and does not entitle him to damages by reason of injury to his property."

While this is a fair statement of the general rule, it also suggests its limitations. If appellant's proposed right of way crossed the county road within the boundaries of respondents' farm at approximately right angles, so that there would be no interference with access to the road at any point of its frontage thereon, this doctrine might be applicable, but it is plain that some three hundred feet of the frontage of respondents' land upon each side of the road will be cut off by the crossing of appellant's right of way at such an acute angle, and their access to the road to that extent be interfered with. This is no different or less an interference with respondents' right of access to the road than as if appellant's right of way were parallel with and adjoining the road for

an equal distance and thereby cut off respondents' access to the same extent. The owners of land abutting upon a public highway have right of access from their land to such highway which they do not share with the general public, as they do the right to travel along the highway. *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188. It is plain from the record before us that the evidence which counsel for appellant complains of was limited by counsel for respondents to damages which will result to them from interference with their access to the road, in so far as such access would be cut off by appellant's right of way crossing the road at such an acute angle. Care was taken by the court to so limit this claimed item of damage by its instructions reading in part as follows:

"You will not allow any damages to defendants in this case by reason of any obstruction of or interference with the use of any highway as a means of travel or transportation along such highway. Any interference with rights in the use of a highway which the defendants, or any of them, hold in common with the public, cannot be made the basis for allowing damages."

We conclude that this contention of counsel for appellant is not well founded.

Some contention is made by counsel for appellant that the trial court erred in giving instructions and refusing to give others requested, touching the measure of damages. It might be possible to discover technical errors in these rulings of the court were we to notice some few expressions therein without reference to the instructions as a whole; but that the learned trial court plainly conveyed to the jury the thought that the ultimate measure of respondents' damages must be the depreciation in the market value of the remaining portion of their farm in addition to the value of the portions taken, seems so plain to us that whatever technical error there may have been in some few expressions of the court, standing

alone, it was wholly without prejudice. We think the cause does not call for further discussion.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

[No. 12546. Department One. February 9, 1915.]

THE STATE OF WASHINGTON, *on the Relation of School District No. 301, of Whatcom County, Plaintiff*, v. JOSEPHINE C. PRESTON, *as Superintendent of Public Instruction, Respondent.*[1]

SCHOOLS AND SCHOOL DISTRICTS—STATE SCHOOL FUNDS—APPORTIONMENT—STATE SUPERINTENDENT—SUPERVISORY POWERS—STATUTORY PROVISIONS. Under 3 Rem. & Bal. Code, § 4562, providing that the superintendent of public instruction shall apportion to the several counties such current school funds as have been certified by the state auditor to be on hand, and 2 Id., § 4563, providing that, for the purpose of such apportionment, the state superintendent shall base his calculations upon the days' attendance as shown by the several county superintendents' last annual reports filed in his office, the state superintendent has discretionary power to refuse to apportion funds for attendance during a period of five days, shown by a county superintendent's report to extend over a portion of the summer vacation during which it was contrary to law to hold school, in view of the very wide supervisory powers given the state superintendent by 2 Id., §§ 4303 and 4307.

MANDAMUS—NATURE—PURPOSES. Since mandamus is a discretionary writ, it must be sought with clean hands, and will not issue to accomplish an illegal purpose, viz: to obtain an apportionment of school funds on account of five days' attendance of school held during the prescribed vacation period, in violation of Rem. & Bal. Code, § 4509.

MORRIS, C. J., and CHADWICK, J., dissent.

Application filed in the supreme court January 13, 1915, for a writ of mandamus to compel the state superintendent of public instruction to apportion certain current school funds. Denied.

[1]Reported in 146 Pac. 175; 149 Pac. 352.

Kellogg & Thompson, for relator.

The Attorney General and *Edward W. Allen, Assistant*, for respondent.

HOLCOMB, J.—School District No. 301 of Whatcom county seeks a writ of mandamus to compel the respondent, as state superintendent of public instruction, to apportion the current school funds of this state, to Whatcom county and to district No. 301, upon the basis of the actual days of school attendance as shown by the last annual report of the county superintendent of schools of Whatcom county.

It is alleged that the respondent, in making the apportionment of school funds in the month of October, 1914, arbitrarily reduced the school attendance of relator district five days for each and every pupil attending school in said district.

The respondent pleaded, in her answer to the application for the writ, that school was maintained in the relator district for the period of five days between June 1, 1913, and September 15, 1913; that, according to the annual report of the superintendent of schools of Whatcom county for the school year ending June 30, 1914, there was a total school attendance in the relator school district of 834,443 days, and that the public schools in said district had been in session a total of 187 days, but that said report did not show the day of the opening nor of the closing of the schools within said district nor the particular days said schools were in session; that five of the 187 days during which the schools in relator district were in session for said year ending June 30, 1914, were within the said vacation period of the summer of 1913, and that the reduction in the number of days' attendance in relator district in making the apportionment by said respondent was by reason of said five days above referred to. Respondent further pleads that it is the practice and the duty of said respondent, as superintendent of public instruction, to require the county superintendent of Whatcom coun-

ty to file with the respondent one copy of the annual report of the city superintendent of schools of the city of Bellingham, which is the relator district No. 301, and that such report of said city superintendent shows the date of the commencement of the school term in such district, and also the number of days' attendance; that, upon the receipt of the annual report of the county superintendent of schools, the same is checked over for errors, and a statement of such errors submitted to the county superintendent, together with a statement of the apportionment for such county based upon such county superintendent's report, and that such county superintendent is required to recheck, sign, and return to said respondent such apportionment statement, and that no apportionment of funds is made until these requirements have been complied with. Respondent further pleads that the procedure above referred to was pursued with reference to Whatcom county as to the apportionment made October 20, 1914, and that numerous errors were discovered in the report of the county superintendent of schools of Whatcom county for the year ending June 30, 1914, and that a letter was written to such county superintendent calling attention to the same; that a further letter was written to said county superintendent on August 26, and that the apportionment statement for Whatcom county was also sent with said letter, and that said statement was corrected as to errors set forth in said letter, and that said apportionment statement corrected was later certified by such county superintendent of schools and returned to the respondent and filed in her office September 23, 1914; that such apportionment statement reduced the apportionment made to Whatcom county and the relator school district five days or five one hundred-eighty-sevenths, due to the fact that information concerning said five days' school held during the vacation period of the summer of 1913 was obtained from the report of the city superintendent of schools of the city of Bellingham, although said information was not obtained specifically by the

annual report of the county superintendent of Whatcom county alone.

To these affirmative answers of respondent, the relator demurs and by its demurrer admits the affirmative allegations contained therein. The relator earnestly contends and urges that the apportionment of school funds by the state superintendent of public instruction is a mere ministerial act in which she has no discretionary powers, but that she must apportion them upon the annual report of the county superintendents of the various counties, and has no power to revise, correct, review, or modify the same, and that in so doing, as is alleged in this case, her action was arbitrary and without warrant of law. Section 4562, 3 Rem. & Bal. Code, relating to the apportionment of current state school funds, provides as follows:

"The superintendent of public instruction shall apportion to the several counties of the state on or before the 20th day of July, October, January, April, May, and June of each year such current state school funds as have been certified by the state auditor to be in the hands of the state and county treasurers."

Section 4563, 2 Rem. & Bal. Code (P. C. 413 § 535) provides:

"For the purpose of the apportionment the superintendent of public instruction shall base his calculations upon the days' attendance as shown by the several county superintendents' last annual reports filed in his office."

It is the contention of relator that the provisions of § 4563, *supra*, are mandatory and leave no discretion whatever with the superintendent of public instruction, but that the apportionment of current state school funds to the several counties of the state must be made upon the actual days' attendance as shown by the county superintendent's last annual report, and that the state superintendent has no power or authority under the law to modify or change the annual report of such county superintendent of schools. Many auth-

orities are cited by relator to the point that the respondent's duties in this matter are purely ministerial, and that she could not inquire into the correctness of the county superintendents' reports; citing *People ex rel. Trustees of School Dist. No. 25 v. Board of Town Auditors*, 126 N. Y. 528, 27 N. E. 968; *School District No. 2 of Multnomah County v. Lambert*, 28 Ore. 209, 42 Pac. 221; *Clark v. Cline*, 123 Ga. 856, 51 S. E. 617; *State ex rel. Tanner v. Cheetham*, 23 Wash. 666, 63 Pac. 552; and *State ex rel. Randolph County v. Evans*, 240 Mo. 95, 145 S. W. 40, Ann. Cas. 1913 B. 1262.

Great reliance is placed upon the last cited case. We find it was decided by a divided court, a bare majority holding to the view that the state superintendent of public instruction of Missouri had no discretion in the matter of apportioning funds where it was claimed by him that the county and school district had fraudulently padded the enumeration or census of the school districts. Upon that same question, we find the authorities about evenly divided, the courts of Kentucky, Georgia, Montana, and Tennessee holding to the contrary. In any event, the matter of going behind the school census taken by enumerators and requiring a considerable investigation to review or correct is very different from reviewing the report or returns of a county or school district officer. In this state, the code of education, which prescribes the duties of school district and county officers and of the state superintendent of public instruction with regard to the public schools and the public school funds, confers upon the state superintendent very wide powers. Section 4303, Rem. & Bal. Code (P. C. 413 § 3 *et seq.*), provides:

"The administration of the public school system shall be intrusted to a superintendent of public instruction, . . . to county superintendents of common schools, to boards of directors and district clerks."

Section 4307, Rem. & Bal. Code (P. C. 413 § 9 *et seq.*), provides among other things:

"The powers and duties of the superintendent of public instruction shall be:

"First. To have supervision over all matters pertaining to the public schools of the state. . . .

"Third. To prepare and have printed such blanks, forms, registers, courses of study, rules and regulations for the government of the common schools, questions prepared for the examination of teachers, and such other blanks and books as may be necessary. . . .

"Ninth. He shall file all papers, reports and public documents transmitted to him by the school officers of the several counties of the state, each year separately. Copies of all papers filed in his office, and his official acts, may be certified by him and attested by his official seal, and when so certified shall be evidence equally and in like manner as the original paper. . . .

"Nineteenth. To perform such other duties as may be required by law."

Section 4472 *et seq.*, Rem. & Bal. Code (P. C. 413 § 345 *et seq.*), provide for the election of county superintendents of schools in each county, and define their powers and duties. Section 4475, subd. 11 (P. C. 413 § 351), requires county superintendents:

"To make an annual report to the superintendent of public instruction on the first day of August of each year, for the school year ending June 30th, next preceding. The report shall contain an abstract of the reports made to him by the district clerks, and such other matters as the superintendent of public instruction shall direct. And it shall be the duty of the county commissioners and county auditor in every county wherein the county superintendent is about to retire from office to withhold the warrant of his salary for the month of July until they shall have received a certificate from the superintendent of public instruction that the annual report of such county superintendent has been made *in a satisfactory manner* [the italics are ours]; and it shall be the duty of the superintendent of public instruction to transmit such certificate to the auditor immediately upon receiving such satisfactory report."

Section 4412, Rem. & Bal. Code (P. C. 413 § 225), provides that all school districts in this state shall maintain school during at least six months each year; Id., § 4509, provides, among other things:

"Every board of directors of a school district of the first class shall, . . . have the power: . . .

"Fifth. To employ, and, for cause, to dismiss teachers, and janitors; to determine the length of time over and above eight (8) months that school shall be maintained, such length of time to give a consecutive vacation of not less than three months between June first of any year and September 15th of the same year; to fix the time for annual opening and closing of schools, and for the daily dismissal of primary pupils before the regular time for closing schools."

Under the last section it will be noted that the law provides that, in school districts of the first class, there shall be a vacation of not less than three months between June 1 of any year and September 15 of the same year. There does not appear to be any provision for the enforcement of this provision. It may be, as relator says, that this is an extraordinary provision of the law, but with that we have nothing to do. The legislature has seen fit to enact it into law, and must have had sufficient reason therefor. The relator in this case admits that it violated the law by holding school for five days during the interdicted or vacation period.

"Since mandamus is a discretionary writ and those who invoke its aid must come into court with clean hands, it will not be issued to accomplish an illegal purpose, . . ." 26 Cyc. 225.

Relator urges with some vigor that the school district should not be penalized for the violation by the school district officers of the law requiring continuous vacations from June 1 to September 15 of any year when, as a matter of fact, school was actually held and the actual attendance for the five days was deducted by the relator. But, on the other hand, the school district through its officers should not wilfully or carelessly violate the law and then ask the court

to relieve them of the consequences thereof. The respondent merely withholds funds which relator has not lawfully earned. Conversely, had relator earned the funds, according to statute, it could lawfully enforce apportionment. Moreover, as the pleadings stand, upon the statement of the respondent that the report of the county superintendent of schools was not correct as to the days' attendance of the relator district, the county superintendent did, in effect, correct the report for Whatcom county in the manner pointed out by the respondent, and upon such corrected report the respondent made the apportionment complained of. Of course, the county superintendent corrected it upon the request or demand of the respondent. That, in our opinion, avails nothing, for if, as contended by the relator, the county superintendent is the sole arbiter of the attendance to be certified for the county, she certainly could have refused to report any other way than as she saw fit.

The relator relies largely upon the decision of this court in the election cases, *State ex rel. Case v. Superior Court*, etc., commonly called the "Seven Sisters" cases, decided September 21, 1914, reported in 81 Wash. 623, 143 Pac. 461. The decision in those cases is not in point. It was held in those cases specifically that the secretary of state was purely a ministerial officer as to the matters there involved, and furthermore it must be conceded that the secretary of state has no supervisory control or authority over election or registration officers of high or low degree. In this case, however, the state superintendent of public instruction, throughout the school code, has very great powers of supervision and control over all the subordinate officers of the common school system. It has been held by this court, in the case of *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478, 93 Pac. 924, and followed later in the same case in 54 Wash. 23, 102 Pac. 881, that general supervision means something more than the power merely to confer with and advise, or to receive reports, or file papers. In other words, that the power of supervision

is not granted to an officer as a mere formality. Suppose, for instance, that the county superintendent had made a report of attendance for the relator school district considerably less than the actual attendance. Would it not be claimed by relator that it could compel the county superintendent to correct the report, or cause the state superintendent to apportion the current funds to the district upon the actual attendance, *notwithstanding* the county superintendent's report? And certainly it would have the right to have the matter corrected in some wise. If that be correct, why is not the converse of the proposition likewise correct?

We believe that the respondent acted within her legal powers and authority in making the apportionment. The writ is therefore denied.

Parker and Mount, JJ., concur.

Morris, C. J. (dissenting)—The office of state superintendent of public instruction is created by statute; its duties and powers are defined by statute. Whenever, therefore, any question arises as to the nature or extent of such duties or powers, reference must be had to the statute to determine it. Referring to the so-called school code, wherein is to be found all the law relating to the public schools of this state, I look in vain for any such delegation of power, the exercise of which results in the act here complained of. No such power is vested in respondent by any law. Nor is there any legal warrant for imposing such a penalty. The school code devotes one entire chapter (Laws 1909, p. 357, Tit. III, ch. 14) to the subject of penalties, providing for various penalties for various acts deemed violations of the provisions of the code. No reference is there made to the penalty sought to be enforced in this case. The legislature, having provided the various penalties to be imposed, it must be assumed that such penalties are exclusive of all others. Assuming, therefore, all that respondent contends as to the extent of her supervisory powers over all matters pertaining to the common schools of

this state, I must withhold from her the right to reduce the apportionment of this school district, because nowhere in the law is she vested with such a power, and not being vested with such a power, she cannot exercise it. I therefore dissent.

CHADWICK, J., concurs with MORRIS, C. J.

ON REHEARING.

[*En Banc.* June 8, 1915.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein. For the reasons there stated, the writ is denied.

[No. 12202. Department One. February 11, 1915.]

CARSTENS & EARLES, INCORPORATED, *Respondent*, v. THE CITY OF SEATTLE *et al*, *Appellants*.[1]

APPEAL—RIGHT TO APPEAL—INTEREST—ABSTRACT QUESTIONS. In an action to foreclose a mortgage, in which the defendant city's lien for an assessment was held superior, the city has no right to appeal from a decree holding that another assessment lien, held by a third person, in which the city was not interested, was inferior to the mortgage lien, on the theory that it was interested in the abstract question of law involved therein.

APPEAL—PROCEEDINGS—ABANDONMENT—SECOND APPEAL. The failure to perfect an appeal, or the abandonment thereof by a party having the right to appeal, does not prevent the party from taking and perfecting a new appeal within the time allowed by law.

APPEAL—PROCEEDINGS—TIME FOR APPEAL—BY COPARTIES — INEFFECTUAL APPEAL. A party having no right to appeal, cannot, by an attempted appeal, curtail or limit the ninety days allowed by law for an appeal to a coparty, interested in the real controversy and having a right to appeal; Rem. & Bal. Code, § 1720, requiring coparties to join in an appeal taken, or give notice of independent appeal within twenty days after an appeal taken, not applying in such a case.

[1]Reported in 146 Pac. 381.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—TAXATION—LIEN—PRIORITY. A local assessment to pay for lands condemned for a municipal improvement is levied in the exercise of the sovereign power of taxation, and may be made superior to all other liens regardless of time.

SAME—ASSESSMENTS—LIENS—PRIORITY—STATUTES. Rem. & Bal. Code, §§ 7787-7813, providing for local assessments to pay for the cost of condemnation proceedings for municipal improvements, upon published notice, and to be enforced by summary sale of the property, makes the lien for local assessments superior to prior mortgage or contract liens on the property, although the law contains no express terms so providing; the intent being to subject the property to the lien by a proceeding *in rem*, regardless of its ownership and of all prior contract liens.

SAME. Such rule is not affected by the fact that the general revenue laws and other local assessment statutes *in pari materia* provide in terms that all mortgage and other private liens shall be superior to the lien of the general or local assessment liens provided for; since the legislative intent is clear to make the assessment lien superior.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 20, 1914, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Reversed as to one defendant.

James E. Bradford, William B. Allison, C. B. White, and *John T. Casey,* for appellants.

Preston & Thorgrimson and *R. H. Coshun,* for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court for King county, to foreclose a mortgage on land in the city of Seattle, executed by the defendants to John G. Smith and wife. The city of Seattle was made a defendant because it claimed a local assessment lien upon the land. J. B. Coughlin was made a defendant because he claimed to be the owner of another local assessment lien by purchase of a delinquent certificate therefor from the city of Seattle. The trial resulted in a decree of foreclosure, decreeing the lien of the plaintiff's mortgage to be superior to the

assessment lien claimed by the defendant Coughlin, but inferior to the assessment lien claimed by the city, and sale of the land was ordered in satisfaction of the plaintiff's mortgage lien, subject only to the assessment lien of the city. The city of Seattle and J. B. Coughlin are prosecuting separate appeals from this disposition of the cause.

The facts necessary for us to notice are not in dispute and may be briefly stated as follows: The mortgage here involved was duly executed on December 29, 1908. The assessment lien of the city is for the cost of the construction of a local sewer improvement. The superiority of this lien over respondent's mortgage was conceded and decreed accordingly, upon the trial, so, of course, the city was successful and had no occasion to appeal so far as the claim of superiority of that lien is concerned. On August 17, 1912, there was duly rendered by the superior court for King county a judgment confirming a local assessment levied upon the land for the sum of $1,727, in eminent domain and local assessment proceedings prosecuted by the city of Seattle for the widening of 18th street, in pursuance of the statute relating to the power of eminent domain by cities and the charging by local assessment of the awards and costs thereof against property benefited thereby. Rem. & Bal. Code, § 7767, and following.

Thereafter, on January 3, 1913, appellant Coughlin became the owner of the lien of this assessment upon the land, by purchase of a delinquent certificate therefor from the city at a sale duly had in pursuance of § 7802, Rem. & Bal. Code, relating to the enforcement of the lien of such assessments. The regularity and validity of these eminent domain and assessment proceedings, and of the sale by which appellant Coughlin became the owner of the lien of the assessment, is not questioned here. Thereafter, on February 11, 1914, this action was commenced by respondent, seeking foreclosure of its mortgage lien. The decree of foreclosure was rendered on June 20, 1914. Thereafter, on July 16, 1914, counsel for the city caused to be served and filed its notice of appeal

from the decree to this court. On July 17, 1914, counsel for defendant J. B. Coughlin caused to be served and filed his notice of appeal from the decree to this court. Counsel for defendant Coughlin, however, did not perfect this appeal by filing an appeal bond within the time prescribed by law. Thereafter, on September 10, 1914, counsel for defendant Coughlin caused to be served and filed a new notice of appeal, which was followed by due execution and filing of an appeal bond on the same day. This, it will be noticed, occurred within ninety days following the rendering of the decree, but not within ten days following the service and filing of the city's notice of appeal.

Counsel for respondent moved to dismiss the city's appeal upon the ground that the city has no appealable interest in this controversy. Counsel for the city does not claim any further interest in the controversy than an interest in the abstract question of whether a special eminent domain assessment to pay the expense of condemnation, such as this, is in law a lien superior to the lien of a prior mortgage upon the land so assessed. We have noticed that the city's local assessment lien was, upon the trial, conceded and decreed to be superior to respondent's mortgage lien, and that that was the only lien then claimed by the city upon the land. True, it acquired the lien of the special eminent domain assessment in the first instance, but it transferred that lien to appellant Coughlin by sale of a certificate of delinquency therefor long before the commencement of this action to foreclose respondent's mortgage lien. It is not claimed that the city has any interest in this controversy by virtue of any covenant of warranty on its part accompanying its sale of this lien to appellant Coughlin, nor that it would suffer in the least by this court holding with the superior court that respondent's mortgage is superior to that lien, other than that thereby there would be established a principle of law touching the superiority of prior mortgage liens over eminent domain assessment liens contrary to what counsel for the city concede to be the

city's interest, not in this particular case, but speaking generally. To recognize the city's claimed right to be heard here as a party to this controversy would compel us to recognize the right of any one claiming an interest in the establishing of some abstract principle of law to be heard in any cause involving such questions of law. The fact that there was at the beginning of this action in the superior court apparently some controversy between respondent and the city of Seattle as to the superiority of their respective liens, does not change the fact that the question of the superiority of appellant Coughlin's eminent domain assessment lien over respondent's mortgage lien is only a moot question of law so far as the city's rights are here concerned. This precludes the city from further participation as a party to this controversy. There is not, and has not been since the rendering of the decree of foreclosure, any actual controversy between the parties in which the city is interested. *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345; *State ex rel. Campbell v. Superior Court*, 25 Wash. 271, 65 Pac. 183; *Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan*, 34 Wash. 216, 75 Pac. 798; *Wilson v. Fraser*, 67 Wash. 347, 121 Pac. 829; *Hillyard v. Board of County Com'rs*, 69 Wash. 423, 125 Pac. 363; 2 Cyc. 533. We conclude that the city's appeal must be dismissed. It is so ordered.

In view of our conclusion upon the merits of the controversy between respondent and appellant Coughlin, the dismissal of the city's appeal is of no consequence to it other than to preclude it from recovering its costs in this court. We have, however, dealt with the question of the city's right of appeal in this case at some length because of the pertinency of that question to the sufficiency of defendant Coughlin's appeal, which we will now notice.

Counsel for respondent moved to dismiss the appeal of defendant Coughlin on the ground that his appeal was not perfected as required by law. Counsel seem to contend that, upon Coughlin's failure to follow his first notice of appeal

with the timely filing of an appeal bond, such failure to perfect that appeal exhausted his right of appeal regardless of the time prescribed by law for appealing. It has become the settled law of this state that the failure to perfect an attempted appeal, or the abandonment of an appeal by a party having the right to appeal, does not in the least impair such party's right to give notice of and perfect a new independent appeal, providing only, that such new appeal is perfected within the time prescribed by law. Rem. & Bal. Code, § 1735 (P. C. 81 § 1223); *Embree v. McLennan*, 18 Wash. 651, 52 Pac. 241; *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16, 54 Pac. 763; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95; *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902; *State v. Miller*, 80 Wash. 487, 141 Pac. 1139.

The principal contention of counsel for respondent upon their motion to dismiss defendant Coughlin's appeal, is that his second notice of appeal and bond filed therewith did not perfect his appeal, although such notice was given and the bond filed within the ninety days prescribed for taking an appeal by Rem. & Bal. Code, § 1718 (P. C. 81 § 1187), because that appeal was not perfected within ten days following the city's notice of appeal as required by Rem. & Bal. Code, § 1720 (P. C. 81 § 1191), which reads as follows:

"All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an independent notice of like appeal, or join in the appeal already taken by filing with the clerk of the superior court a statement that he joins therein or in some part thereof, specifying in what part. Any such party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case; nor can he independently appeal from any judgment or order already appealed from, more than ten days after

service upon him of written notice of the former appeal, unless such former appeal be afterwards dismissed."

This contention, we think, finds its answer in the fact already noticed by us, that the city has no right of appeal in this case. Surely a party without the right of appeal cannot, by an attempted appeal, limit the time within which a party to the real controversy may appeal, though a party possessing such right of appeal may by giving notice and perfecting his appeal, thereby limit the time within which another party may appeal, by virtue of the provision of § 1720 above quoted. The following decisions of this court render it plain that the city was not entitled to notice of Coughlin's appeal, because its rights could not be affected in the least by any disposition of the controversy between respondent and appellant Coughlin involved in his appeal. *Sudden & Christenson v. Morse*, 48 Wash. 101, 92 Pac. 901; *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723; *Iverson v. Bradrick*, 54 Wash. 633, 104 Pac. 130; *Exposition Amusement Co. v. Raeco Products Co.*, 55 Wash. 314, 104 Pac. 509; *Soderberg v. McRae*, 67 Wash. 104, 120 Pac. 878. It follows that no attempted appeal by the city could in the least curtail the right of Coughlin to appeal within ninety days following the entry of the decree, as provided by Rem. & Bal. Code, § 1718. We conclude that the motion to dismiss Coughlin's appeal must be denied. It is so ordered.

Counsel for appellant Coughlin contend that the trial court erred in decreeing his assessment lien, evidenced by the certificate of delinquency purchased from the city, inferior to respondent's mortgage lien. We are of the opinion that this contention must be sustained. Counsel for respondent invoke the general rule that tax liens are creatures of the statute and exist as an aid to the collection of taxes only to the extent of, and have no superiority over, other liens, except as the statute may so provide, citing, *Seattle v. Hill*, 14 Wash. 487, 45 Pac. 17, 35 L. R. A. 372; *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31; *Knowles v. Temple*, 49 Wash. 595, 96 Pac.

1; and decisions from other states; from which it is argued that the statute upon which this eminent domain local assessment lien is rested does not, in terms or by fair implication, render such assessment lien superior to a prior mortgage upon the land. Our own decisions above cited are not wholly decisive of the question here presented.

In *Seattle v. Hill*, the assessment lien was held superior to a prior mortgage lien, though the assessment statute did not expressly so provide, but provided for its collection as other taxes which were by general statute made superior to prior mortgage liens. The court there said:

"It is undoubtedly true that a prior mortgage on real estate is not displaced by a subsequent assessment for local improvements unless the statute authorizing such improvements and assessments by express words or fair implication otherwise provides."

The holding in that decision seems to have been rested upon the theory that the superiority of the assessment lien over a prior mortgage lien was not dependent upon an expressed provision of the statute to that effect, but that such conclusion might be reached by language of the statute fairly so implying.

In *Phelan v. Smith*, there was involved only the question of the lien of a personal general tax upon personal property. The facts of that case so clearly show that the specific lien there claimed did not exist under the terms of the statute that we think the decision is of no aid here.

In *Knowles v. Temple*, there was involved only the question of the time of the attaching of an assessment lien upon land as between vendor and vendee. The question of its superiority in favor of the city or its assignee over a prior mortgage or other private lien was not involved.

It seems quite clear to us that the superiority of appellant's eminent domain assessment lien does not necessarily depend upon the time of its creation as compared with the time of the creation of respondent's mortgage lien. The inherent

nature of the assessment lien may be such as to render it superior regardless of the question of its priority as to time. This assessment was levied in the exercise of the sovereign power of taxation (*Seattle v. Hill, supra*). This is no less true because the assessment was levied by a proceeding supplemental to an eminent domain proceeding. It was nevertheless levied to pay for the acquiring of land to widen a public street, and has the same legal sanction as any other local assessment based upon benefits to the property charged. We have had occasion to recognize this separateness of the assessment branch of the proceeding from the condemnation branch of the proceeding, though they are both prosecuted together in the superior court. Rem. & Bal. Code, §§ 7772, 7792 (P. C. 171 §§ 39, 79); *In re Third, Fourth, and Fifth Avenues*, 47 Wash. 109, 94 Pac. 1075, 95 Pac. 862; *Spokane v. Pittsburg Land & Imp. Co.*, 73 Wash. 693, 132 Pac. 633; *Commissioners Commercial Waterway District No. 2 v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042; *In re Pine Street Assessment*, 83 Wash. 281, 145 Pac. 179.

That the legislature may create a lien for taxes, whether such taxes be general or by local assessment, superior to all other liens regardless of priority of time, is settled beyond controversy. See note to *Seattle v. Hill*, 35 L. R. A. 372. The real question in this case is, Has our legislature, by the statute upon which appellant's eminent domain assessment lien rests, by fair implication, made such liens superior to prior mortgage liens? Let us turn to the statute and notice the procedure there provided through which such assessment liens are created. Referring to the law of eminent domain and local assessments to pay the expense thereof in cities, we find, after awards for taking and damaging of property are made by the court or jury, and the amount of funds necessary to be raised is thus ascertained, an assessment roll is made up by eminent domain commissioners, appointed by the court, charging property they find benefited by the city's acquisition of the property. This roll is then filed in

court, and an order made by the court fixing a time for hearing objections thereto by persons interested. Thereupon it becomes the duty of the eminent domain commissioners to give notice by mail to the owners of the property so shown to be assessed, whose names and addresses are known to them, also to cause notice to be posted in three public places in the city, one of which is to be in the neighborhood of the proposed improvement, also to cause notice to be published in a newspaper in the city. The statute makes no provision whatever for the service of notice personally upon any one. "Any person interested in any property assessed may file objections," and be heard before the court upon the question of benefits to property he is interested in and the justness of the assessment so returned by the eminent domain commissioners; the court having power to confirm, modify or correct assessment so made as the justice of the case may appear. The assessment being made and confirmed by the court, notice for its collection is published by the city treasurer. The time prescribed by the statute for paying the assessment having expired, those remaining unpaid at that time become delinquent, and upon due notice, the property charged with such delinquent assessment is offered for sale by the city treasurer, and for such tracts as there are no bidders, the city becomes the purchaser. A certificate of such delinquent sale thereupon issues to the purchaser by the city treasurer. "The purchaser at such sale acquires a lien on the property so bid in by him for the amount paid by him at such sale . . ." During the two years following, the property is "subject to redemption by the former owner or his grantee, mortgagee, . . ." If not redeemed within that period by someone so interested in the property, the purchaser at the sale, or his assignee, holding the certificate of delinquency, is entitled to a deed for the land from the city treasurer, upon giving notice to the owner and an opportunity to redeem before the issuance of such deed. "All assessments levied by any city

under this act shall, from the date of the judgment confirming the assessment, be a lien upon the real estate upon which the same may be imposed, and such lien shall continue until such assessments are paid."

In addition to the remedy by sale of the land as above noticed, the city may enforce the lien of the assessment by an ordinary civil action of foreclosure in court. The statute contains no express provision in terms making the assessment lien superior to prior mortgages or other prior private liens. Rem. & Bal. Code, §§ 7787-7813 (P. C. 171 §§ 69-121). This procedure, we are of the opinion, points to a legislative intent to charge the assessment against the land itself regardless of its ownership, and regardless of all prior liens upon its ownership which rest upon private contract, or which of necessity are only a charge upon some person's title or interest in the land. Such private liens, of course, can rise no higher than their source. For, manifestly, no person can by contract create a lien upon land superior to his own title or interest therein, while the sovereign power of taxation can create a lien superior to every private interest in the land.

This procedure has all the indicia of a pure proceeding *in rem;* except possibly actual physical seizure of the land, which is not required in a proceeding *in rem* against land as it is in such a proceeding against personal property. The prescribed service of notice upon those interested in the land is only constructive (Black's Law Dictionary, page 255), no actual personal service of notice being required by the statute. This being the exercise of the sovereign power of taxation, as we already noticed, such constructive service satisfies all constitutional requirements of due process of law. 2 Jones & Paige, Taxation by Assessment, § 760; *Bauman v. Ross*, 167 U. S. 548. While the lien of the assessment may be enforced by ordinary civil action in court, it may also be enforced by the very common summary method of sale of the land and execution of a tax deed therefor by the city treas-

urer upon failure of those interested in the land, including mortgagees, to redeem within the time prescribed by law, without any further hearing whatever being awarded than upon the question of the validity of the assessment lien. This also satisfies all constitutional requirements of due process of law in the enforcement of tax liens. Black, Tax Titles, §§ 148, 149.

Counsel for respondent relies principally upon the fact that the statute makes no specific provision in terms touching the question of superiority of the assessment lien over prior mortgage and other private liens. That, however, we think, is not the final test of the superiority of the assessment lien. Its superiority rests in the fact that it is imposed by virtue of the sovereign power of taxation; that the procedure by which it becomes a charge upon the land is a proceeding *in rem* with no requirement for personal service of notice upon any person, and that the statute in terms makes it a lien "*upon the real estate*" without reference to any person's title or interest therein, which lien "shall continue until such assessments are paid." This conclusion is not without strong support in the decisions from other states. Indeed we think it is in harmony with the weight of authority.

In *Morey v. Duluth*, 75 Minn. 221, 77 Pac. 829, there was involved the question of the superiority of a local assessment lien over a prior mortgage, under a statutory procedure in substance the same as the statute which this assessment lien rests upon, there being no provision in the statute in terms making the assessment lien superior to mortgage or other private liens. In holding the assessment lien to be superior to the mortgage lien, Chief Justice Start, speaking for the court, said:

"It is true, as claimed by plaintiff, that the lien of the assessment attaches at a time fixed by the charter, that is: from and after the time of the confirmation of the assessment roll and filing thereof; but this does not justify the conclusion that the lien is subordinate to all prior liens on the

land, although the charter does not expressly declare that the lien of the assessment is paramount to all other liens.

"When the several provisions of the charter to which we have referred are read and considered together, it is clear that the only reasonable construction which can be given to them is that the lien of the assessment, when it once attaches, affects all interests in, or liens upon, the property without reference to the time when they are acquired. Therefore the assessment is the paramount lien on the property precisely as if the assessment were a general tax. Any other construction would practically defeat the whole scheme for local improvements provided for by the charter. The legislature had the undoubted power to so make the assessment the paramount lien. *Provident Institution for Savings v. Jersey City*, 113 U. S. 506.

"The proceeding authorized by the charter to charge land with the cost of local improvements to the extent of benefits received therefrom is one *in rem*. It is the whole interest in the land that is assessed for the improvement, not some particular estate therein. The improvement is for the benefit of all interests in the land, for that of the lienholder as well as that of the fee owner, and necessarily the lien of the assessment for the improvement must be coextensive with the estate benefited and assessed. 2 Blackwell, Tax Tit. § 695. If the land is sold under the judgment, the whole estate and interest of all parties therein passes to the purchaser, subject to the right of redemption, and the deed is made *prima facie* evidence of title in the grantee. The title conveyed by the deed is the whole interest in the land, not simply that of the fee owner.

"It is true that liens of the class to which assessment liens belong are purely statutory, and that their existence and extent depend on the statute. But our construction of the charter is that it does, by necessary implication, provide that the lien of the assessment on the property benefited by the improvement shall be paramount to all other interests therein, including prior mortgages or other liens thereon.

"It is further urged that under the provisions of the charter only owners of the land, in the strict meaning of the term, that is: those who possess the legal title, are permitted to appear and defend against the entry of judgment for the assessment; hence, the plaintiff being only a mortgagee, never had any right or opportunity to be heard. It is apparent,

however, from the provisions of the charter, that the word 'owner' is not used therein in its strict sense, but that it means persons interested in the land, which includes mortgagees. Thus, all persons interested in the assessment are given the right to appear at the hearing on the application for confirmation of the assessment, and it is the duty of the court to hear them."

In *Wabash Eastern R. Co. v. Commissioners of East Lake Fork Special Drainage Dist.*, 134 Ill. 384, 398, 25 N. E. 781, 10 L. R. A. 285, there was involved the question of the superiority of a local assessment over a prior trust deed, which was in effect a mortgage lien. Judge Bailey, speaking for the court, said:

"The next proposition submitted by counsel for the plaintiff in error is, that the deeds of trust having been executed and recorded long prior to the assessment or to the passage even of the act by which the assessment was authorized, they constitute a lien superior to that of the assessment, and that the decree therefore is erroneous in declaring the lien of the assessment superior and paramount to that of the deeds of trust.

"Section 72 of the Drainage Act provides that all assessments or levies thereafter made under the provisions of said act 'shall be taken, held and considered a lien upon each and every tract of land or property assessed in such district, to the extent and amount of the proportionate share assessed or levied against the same.' The lien thus created is not upon any specific interest in the land but upon the land itself, that is, upon the *res*. Special assessments are a species of taxation, peculiar in their nature it is true and subject to special rules. But the power to levy them is clearly referable to the taxing power. As said by Judge Cooley in his Treatise on Taxation, 'That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded as closed.' Cooley on Taxation, 623, and authorities cited in note. It follows that the lien given by the statute in case of such assessments is of the same nature and subject to the same general rules as that given in case of general taxes.

"A lien of this character attaches to the land itself, irrespective of the interests of the various owners, and is para-

mount to all other claims or liens against the property. In *Ostenberg v. Union Trust Co.*, 93 U. S. 424, which was a case involving a lien on land given by the revenue laws of this state, the court, in discussing the nature and extent of such lien, say: 'It is true that the title of a purchaser at a judicial sale under a decree of foreclosure takes effect by relation to the date of the mortgage, and defeats any subsequent lien or incumbrance. A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale pursuant to the statute, prescribing the mode of assessing and collecting the same, the purchaser takes a valid and unimpeachable title.' So, in *Cooper v. Corbin*, 105 Ill. 224, this court said: 'Taxes levied upon real estate become a charge upon the land itself, and if they are not paid, the land may be sold for the taxes due thereon, and title will pass regardless of any incumbrance resting on the land.' Again, in *Jack v. Weiennett*, 115 Ill. 105, we said: 'The claim for the payment of taxes upon the citizen is, therefore, of necessity, paramount to all other claims against the property.' In the light of these authorities, and upon principle as well, it must be held that the lien of the assessment in this case is superior to that of the deeds of trust, and that the Circuit Court was correct in so holding.

"It is urged that the Drainage Law, so far as it attempts to give a lien for assessments superior to the liens of existing incumbrances, is unconstitutional because it violates the obligation of contracts or divests vested rights. This clearly cannot be so. Every property-owner holds his property subject to the exercise of the taxing power, and it is immaterial, so far as this question is concerned, what may be the nature of his interest, whether the fee, an estate in expectancy, an estate for years or a mere lien. This is true, as every one must admit, in relation to general taxes, where the only return to the tax-payer is the protection and security which the government gives him, and *a fortiori* should it be true in case of special assessments where, in theory at least, he receives an adequate and complete return for the money assessed in the enhanced value of the estate or property which he owns or to which his lien attaches."

In *Lybass v. Town of Ft. Myers*, 56 Fla. 817, 47 South. 346, Justice Whitefield, speaking for the court, said:

"The intention of the law making power to give priority to a municipal lien for local improvements over contract liens of individuals may be implied from the language of the law creating the lien and from the nature and purpose of the lien. . . .

"The general law provides that the city or town council shall have power 'to require the owners of real estate within the corporate limits to construct uniform and substantial sidewalks around their several lots, and to keep the same in repair; and upon failure to do the same within the time and manner prescribed, the said council may have the same done, which shall be a lien against said lots which lien may be enforced in the manner prescribed,' &c. Sec. 1017 General Statutes. This section of the law was enacted in 1887 and provides the lien. When the improvements are made the lien attaches, and being statutory and in the nature of a tax for governmental purposes has relation to the statute. The lien is to 'be enforced in the manner' of other liens.

"The mortgage lien was taken subject to the statute authorizing the municipal governmental lien for sidewalk improvements as well as to other governmental demands for taxes or municipal assessments. The lien is for an improvement that enhances the value of the property and consequently the value of all liens upon it. The improvement is primarily for a governmental purpose in the interest of the public welfare, and as such is entitled to priority if so intended by the legislature. The exigencies of all governments justify giving to governmental taxes, assessments and demands priority over private rights. As the lien is given by law in return for benefits to the property as well as for the common good, and as the action of the town is in its governmental capacity, the demand is in the nature of a governmental assessment and has priority over the rights of all persons having an interest in the property if it can be gathered from the language and purpose of the law that such was the intention of the lawmaking power. . . .

"If, as it seems, governmental statutory liens for local improvements may be made superior to mere contract liens of private parties acquired after the enactment of the statute providing for the lien, it is not necessary for the statute to

in terms enact the priority. From the nature of the governmental function being performed, and the rights of the public in the enforcement of the police powers, it is clear the intention of the legislature was to put such liens upon the same footing as tax liens, thereby giving them priority over contract liens of private parties acquired subsequent to the enactment of the law providing for the lien of the municipality for sidewalk improvements."

The only decisions called to our attention by counsel for respondent expressing a contrary view dealing with the question of the superiority of local assessment liens over prior private liens where the statute makes no express provisions as to superiority, are the Indiana decisions. *Cook v. State*, 101 Ind. 446; *State ex rel. Ely v. Aetna Life Ins. Co.*, 117 Ind. 251, 20 N. E. 144; *Pierce v. Aetna Life Ins. Co.*, 131 Ind. 284, 31 N. E. 68. We do not notice numerous cited decisions dealing with statutes which in terms expressly make local assessment liens superior to prior mortgages and other private liens. They are of no aid here.

Counsel for respondent also cite and rely upon the following decisions, dealing with the question of a personal property general tax lien upon land owned by the taxpayer, which hold, in effect, that such a tax lien attaches only to the title or interest the taxpayer may have in the land: *Miller v. Anderson*, 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317; *Bibbins v. Clark*, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278; *Bibbins v. Polk County*, 100 Iowa 493, 69 N. W. 1007. Manifestly these decisions are of no controlling force here, because the obligation to pay the personal property general tax there involved would not be a lien upon the land of the taxpayer beyond the title or interest of such taxpayer in the land. It manifestly is not a pure charge *in rem* against the land, but being a charge dependent upon the taxpayer's interest in the land, would reach no further than that; in any event not unless the statute in the most plain and mandatory terms so provided. Indeed, the power of the legisla-

ture to make a personal property tax a lien upon the taxpayer's land beyond his interest in the land may well be doubted.

In *City of Paterson v. O'Neill*, 32 N. J. Eq. 386, where there was involved the question of the superiority of a general tax lien over a prior mortgage, the statute being silent so far as providing in terms that such tax lien was superior, there, as here, those interested in the land, including mortgagees, had the right to redeem within the statutory time following the tax sale. This fact appears to have been of controlling force upon the mind of the court in arriving at the conclusion that the lien of a mortgagee was inferior to the lien of the tax. Referring to this right on the part of the mortgagee to redeem, the court said:

"The city charter requires the land to be assessed for its full and fair value, and at the same time enacts that mortgages on the land shall not be taxed in the hands of any person in this state. From these provisions, exempting from assessment the estate of the mortgagee, but imposing the assessment for its full value against the owner, and making such assessment valid notwithstanding any error or omission in naming the owner, together with the further important provision that the mortgagee, tenant, or any person having a legal or equitable interest in the premises may redeem the same when sold at any time within twelve months from the issuing of the certificate of sale, I cannot doubt that the intention is evinced to make the lien of the tax paramount to that of the mortgage. Unless this be so, no good or satisfactory reason is perceived why this provision on behalf of the mortgagee was enacted. If his estate were intended to be left unaffected by and paramount to the tax, why should he need to redeem? Why redeem or buy back what had not been sold away?"

Having in mind that the superiority of the lien of a general and local assessment tax are each determinable by the same rules of construction, this view of the New Jersey court lends support to our conclusion, upon the same principle as do the Minnesota, Illinois and Florida cases above noticed.

Attention is called to our general revenue statutes and certain other of our local assessment statutes, which provide in terms that all mortgage and other private liens shall be inferior to the lien of general and local assessment taxes. The absence of such a provision from the statute upon which this assessment lien rests, it is insisted, indicates a legislative intent to render this assessment inferior to prior mortgages and other private liens, upon the theory that this and those statutes are *in pari materia*. The rule thus invoked, however, is after all only a rule of construction to be applied as an aid in determining legislative intent. We think that the language of this statute so plainly evidences a legislative intent to make this assessment a lien upon the land irrespective of all private title or interest therein, and superior to all mortgage and other private liens thereon, as to render the rule invoked of no value in the solution of this problem.

There is a marked distinction between a private lien which of necessity can only reach the title or interest of some person in land, and a lien upon the land apart from such interest. Proceedings to enforce the former are often loosely referred to as proceedings *in rem*, but they are not and cannot be purely *in rem* such as proceedings to enforce the latter may be if so authorized by statute. This thought finds expression in Phillips on Mechanics' Liens (3d ed.), § 306, where, discussing the nature and effect of a suit and judgment foreclosing a mechanics' lien, it is said:

"It is not a technical proceeding *in rem*, because it must be commenced, as in ordinary actions, upon account. It must be against some person by name as defendant, and can only be by virtue of a contract with the owner of the land. The judgment, likewise, must be rendered against some person as defendant, and cannot be against the land alone, as the lien extends only to his interest. There must be a suit against the party promising, not a mere proceeding *in rem*, regardless of contract."

A mortgage lien is manifestly of this nature, for, of course, a mortgagor cannot create a lien superior to his own title or

interest in the land. Vastly superior in force in this regard is the sovereign power of taxation as exercised in the creation of this assessment lien.

Upon principle, and as we believe, also, upon the weight of authority, we conclude that the decree of the trial court must be reversed, in so far as the eminent domain assessment lien held by appellant Coughlin is, in effect, decreed to be inferior to respondent's mortgage lien. It is so ordered, and the cause remanded to the superior court with directions to correct its decree so as to preserve the rights of appellant Coughlin under his local assessment lien as superior to respondent's mortgage lien.

MORRIS, C. J., CHADWICK, and CROW, JJ., concur.

[No. 12251. Department One. February 11, 1915.]

J. S. BOOK, *Appellant*, v. A. J. WEST, *Respondent*.[1]

PUBLIC LANDS—TIDE AND SHORE LANDS—PREFERENCE RIGHT TO PURCHASE—PROCEEDINGS—APPLICATION—SUFFICIENCY. Upon the filing of conflicting applications for the purchase of state tide lands by persons claiming to be the owners of the abutting uplands, whereupon, pursuant to Rem. & Bal. Code, § 6750, the state board of land commissioners required the submission under oath of a full statement of the facts whereby the parties claimed a preference right to purchase, an applicant may abandon his claim as an abutting owner and base his preference right to purchase upon the fact of his improvement of the tide lands prior to March 26, 1890; since the above act expressly provides that the affidavit, required on the filing of conflicting claims, shall be the only pleading required and shall be deemed denied by all the other applicants.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 7, 1914, in favor of the defendant, in an action to determine the preference right to purchase tide lands, tried to the court. Affirmed.

[1]Reported in 146 Pac. 167.

G. C. Israel, for appellant.

John C. Hogan and *A. E. Graham*, for respondent.

PARKER, J.—This controversy involves the conflicting claimed preference rights of A. J. West and J. S. Book to purchase from the state of Washington lots 1 and 2 of tract 14, Aberdeen tide and shore lands. After a hearing had before the board of state land commissioners, that board awarded the preference right to purchase to Book. Thereupon West appealed from the decision of the board to the superior court for Chehalis county, which court rendered its judgment reversing the decision of the board and awarding the preference right of purchase to West. From this judgment of the superior court, Book has appealed to this court.

The legislature of 1903 passed a special act providing for the resurvey, appraisal and sale of state tide and shore lands within the city of Aberdeen. Laws of 1903, page 22. Section 4 of that act, in so far as we are here concerned with its provisions, reads as follows:

"The owner or owners of lands abutting or fronting upon any of the tide lands hereinbefore mentioned shall have the right, for sixty (60) days following the final appraisement and plat of such tide lands with the commissioner of public lands, to apply for the purchase of all or any portion of the tide lands in front of the lands so owned: *Provided*, That if valuable improvements, and in actual use prior to March 26, 1890, for commerce, trade, residence or business, have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to apply for the purchase of lands so improved for the period aforesaid: *Provided, further*, That the owner of such improvements shall have the right in all cases to purchase in addition to the tide lands covered by such improvements, unoccupied and unimproved tide lands adjoining such improvements sufficient for the necessary and convenient use and enjoyment of such improvements and business, and such right of purchase shall be prior and superior to that of the upland owner or others claiming under him:"

Section 5 of the act provides, in substance, that the manner of exercising such preference rights, the right of appeal, and all proceedings shall be as provided by the general law relating to the disposition of such lands. The general law gives to upland owners and improvers of tide and shore lands substantially the same preference right of purchase as is given by this special Aberdeen law. The preference right is to be exercised by timely application for the purchase of the land, the only requirements as to the form or contents of such application are that it "shall be in writing and filed with the commissioners of public lands." The general law, Rem. & Bal. Code, § 6750 (P. C. 477 § 139), provides, among other things, as follows:

"If at the expiration of said sixty days two or more applications shall have been filed for any tract, conflicting with each other, the harbor line commission shall forthwith order a hearing to determine the rights of the parties applying for said tract. They shall require each applicant, within a time stated, to submit under oath a full statement of the facts whereby he claims a preference right of purchase, and such statement shall be the only pleading required and will be deemed denied by all other applicants."

The words "harbor line commission" as used in this section now means "board of state land commissioners," which board has succeeded to the duties of the harbor line commission by virtue of a later statute. Rem. & Bal. Code, § 6605 (P. C. 477 § 13). Upon the issues thus made up, hearing is to be had before the board of state land commissioners and decision rendered as the justice of the case may require.

On February 16, 1907, a resurvey and plat of the Aberdeen tide and shore lands was duly filed, together with an appraisal of the lands as provided by the special act of 1903. Thereafter, on March 5, 1907, West filed his application for the purchase of lots 1 and 2 of tract 14, stating therein: "I am the owner of the uplands immediately contiguous to said tide lands," and claiming his preference right to purchase lots 1 and 2 by virtue of such ownership, making no claim or men-

tion of the fact that he was an improver of the tide land lots prior to March 26, 1890, or that he claimed any preference right of purchase by virtue of being such improver. Thereafter, on April 10, 1907, Book filed his application for the purchase of the same lots, making the same statement as to his ownership of the contiguous uplands as West in his application. Thereupon, the state board of land commissioners set the matter for hearing, and entered its order requiring both applicants "to submit under oath and file with the commissioners of public lands at Olympia, Washington, a full statement of the facts whereby the applicant claims the preference right to purchase said tide and shore lands," as required by the above quoted provisions of Rem. & Bal. Code, § 6750. Thereafter, within the time required by the order of the board, West duly filed his statement alleging, in substance, that he made valuable improvements upon lots 1 and 2 of tract 14 prior to March 26, 1890; that he was then, and is now, the owner of such improvements, and claiming the preference right to purchase lots 1 and 2 because of his ownership and use of such improvements. West, however, made no allegation in his statement relative to his ownership of the uplands, apparently abandoning his claimed right of purchase upon that ground. It may be noted that this statement of West, while filed within the time prescribed by the order of the board under the supervision of Rem. & Bal. Code, § 6750, was not filed within sixty days following the official filing of the survey and appraisement of the Aberdeen tide lands.

Thereafter, when the matter came on for hearing before the board, counsel for Book moved that West's statement, which had been filed in pursuance to the order of the board, be stricken from the files and his application denied, for the reason that he had not made his claimed preference right of purchase upon the ground of being an improver of the tide lands, within sixty days following the filing of the survey and appraisement thereof, and had abandoned his claim of preference right

of purchase upon the ground of his ownership of the upland. Thereupon, counsel for West moved the board that he be permitted to amend his original application so as to show that his preference right of purchase rested both upon the fact of his being an improver and upon his ownership of the upland. The board ruled, in substance, denying him such right of amendment, and refused to entertain his claimed preference right of purchase in so far as it rested upon the fact of improvements being made by him prior to March 26, 1890, and further decided, upon the evidence before them, that he was not the owner of the uplands, and awarded the preference right to purchase lots 1 and 2 to Book.

Upon appeal to the superior court, counsel for West renewed his motion to amend his original application to conform with his statement filed with the board of state land commissioners in pursuance of its order. While the superior court permitted the amendment to be made, or rather proceeded as if it were made, it expressed the opinion that such amendment was wholly unnecessary, proceeding upon the theory that the statement filed by West in pursuance of the board's order as provided by the above quoted portions of Rem. & Bal. Code, § 6750, constituted West's pleading and the foundation of his claimed preference right of purchase. The cause then proceeded to hearing before the court, resulting in judgment in favor of West, reversing the decision of the commission, and awarding to West the preference right to purchase lot 1 and lot 2 except the northerly thirty feet thereof, upon the ground that West had made valuable improvements thereon prior to March 26, 1890, had since then continued to use the same for commerce and trade, and that all of the lots except the northerly thirty feet thereof was necessary to the convenient use and enjoyment of such improvements.

It is first contended by counsel for Book that the superior court erred in permitting West to proceed in that court upon the ground that he was resting his claim upon his im-

provement of the tide land prior to March 26, 1890. We cannot agree with this contention, in view of the fact that there is no requirement of the statute that the applicant shall state the grounds of his claim in his original application to purchase, and that he is, upon conflicting applications being made, required to submit under oath a full statement of the facts whereby he claims a preference right to purchase, which statement by the express terms of § 6750 becomes his pleading in the controversy. We agree with the view expressed by the learned trial court that the question of amendment of West's original application became of no consequence upon the arising of this conflict between his and Book's applications. It is not at all difficult, in the light of this whole record, to see that there was room for difference of opinion as to whether West or Book was the owner of the uplands immediately bordering upon this tide land, by reason of the uncertainty as to there being a narrow strip of land between the tide land and the platted lot of the city of Aberdeen owned by Book, and West owning such strip of land if it existed. This, however, only goes to the question of West's good faith, which after all is of little consequence here in view of his plain right to state his cause of action by affidavit as required by the statute, upon a conflict arising, and have it treated as his first pleading in the controversy. Manifestly, there is nothing inconsistent in West's allegation in his original application that he was the owner of the upland, and the allegation in his formal pleading that he was the improver of the tide land. Our decisions in *Johnson v. Woodworth*, 18 Wash. 243, 51 Pac. 375, and *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033, while not exactly in point, are in harmony with the conclusions we here reach. We are quite clear that the learned trial court correctly disposed of this question in favor of West.

It is also contended that the trial court erred in awarding the preference right of purchase to West, upon the ground of his improving the tide land prior to March 26, 1890. This

contention presents only a question of fact as to which we think the evidence clearly preponderates in favor of West. We do not think this branch of the case calls for further discussion.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

[No. 12337. Department One. February 11, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. NICK GEORGE, *alias Tony John*, *Appellant*.[1]

CRIMINAL LAW — FORMER JEOPARDY—STATUTES—IMPLIED REPEAL. Rem. & Bal. Code, § 2113, providing that a conviction or acquittal by a judgment upon a verdict shall be a bar to another prosecution for the same offense, notwithstanding a defect in form or substance in the former charge, is hostile to, and therefore impliedly repealed by, the later enactment of Id., § 2316, of the "penal code" providing that no order of dismissal or directed verdict of not guilty . . . on the ground of any defect in such indictment or information shall bar another prosecution for the same offense; even if it is not expressly repealed by Id., § 2304, repealing all acts "in conflict herewith."

STATUTES—TITLES AND SUBJECTS—SUFFICIENCY. The title to the "penal code" (Rem. & Bal. Code, § 2253 *et seq.*), an act "relating to crimes and punishments and the rights and custody of persons accused or convicted of crime," is broad enough to admit of amendments or implied repeals of sections of the former laws relating to criminal procedure; *e. g.*, to embrace Rem. & Bal. Code, § 2316, providing that no order of dismissal or directed verdict of not guilty . . . on the ground of any defect in such indictment or information shall bar another prosecution for the same offense, thereby impliedly repealing § 2113 in the code of criminal procedure on the same subject.

STATUTES—IMPLIED REPEALS. While repeals by implication are not favored, they are freely admitted where it appears that the legislature intended to cover an entire subject of legislation.

CRIMINAL LAW—FORMER JEOPARDY—INSUFFICIENT CHARGE. In the absence of statute, there could be no lawful conviction or acquittal

[1]Reported in 146 Pac. 378.

upon an information or indictment which was insufficient to state an offense, and hence no plea of former jeopardy thereon.

SAME—FORMER JEOPARDY—WAIVER OF PLEA. Where a conviction is set aside on appeal by the accused, he cannot, upon a subsequent charge for the same offense, urge the former conviction as a bar or set up the plea of former jeopardy.

CRIMINAL LAW—APPEAL—REVERSAL—EFFECT. Upon reversing a conviction for insufficiency of the information, an order directing the dismissal of the cause, instead of remanding the case for further proceedings under Rem. & Bal. Code, § 1749, does not affect the rights of the accused, or prevent his subsequent arrest and trial upon a sufficient information.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 20, 1914, upon a trial and conviction of attempting sodomy. Affirmed.

Thos. F. Murphine and *Harry Sigmond*, for appellant.

John F. Murphy and *Thomas J. L. Kennedy*, for respondent.

CHADWICK, J.—Appellant was formerly convicted in the court below and appealed to this court, where the judgment was set aside upon the ground that the information did not state facts sufficient to constitute a crime. *State v. George*, 79 Wash. 262, 140 Pac. 337. Our direction was that the case should be dismissed. Appellant was rearrested and put to trial upon a sufficient information. From a judgment of conviction, he has again appealed to this court. When arraigned and called to plead, appellant entered a plea of former conviction, which, being overruled, he refused to plead further. A plea of not guilty was entered for him. Rem. & Bal. Code, § 2109, par. 3 (P. C. 135 § 1121). The plea was renewed upon the trial by way of objections to the admission of testimony to support the charge.

Counsel admit that there would have been no jeopardy if appellant had been discharged at any time before verdict and judgment thereon (*State v. Riley*, 36 Wash. 441, 78 Pac. 1001), but insist in their brief and very able oral argument

that the rule that jeopardy attaches when an accused person has been placed upon trial in a court of competent jurisdiction on a sufficient indictment before a jury regularly impanelled and sworn, and that a discharge of the jury without due cause and without consent of the accused is an acquittal (*State v. Kinghorn*, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. [N. S.] 136), can have no application under the plain words and terms of Rem. & Bal. Code, § 2113 (P. C. 135 § 1129), which provides,

"A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, *notwithstanding a defect in form or substance* in the indictment or information on which the conviction or acquittal took place." [Italics are ours.]

They cite the following cases which were decided under statutes in terms substantially the same as § 2113: *Shoemaker v. State*, 58 Tex. Cr. 518, 126 S. W. 887; *State v. Ward*, 48 Ark. 36; *Harp v. State*, 59 Ark. 113, 26 S. W. 714; *Tufts v. State*, 41 Fla. 663, 27 South. 218.

In the *Ward* case, the court said:

"The statute provides that an acquittal or conviction by a judgment or a verdict shall bar any other prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the trial took place."

Counsel declare that we have admitted the rule to be the same as there declared, in *State v. Burns*, 54 Wash. 113, 102 Pac. 886:

"The common law rule prevails in this state except as modified by statute, and under the statute cited, an acquittal upon a defective information is no bar to another prosecution unless the judgment of acquittal is based upon a verdict after trial. In this case there was no trial and no verdict; hence the dismissals upon the defective complaint and information were no bar to a further prosecution."

If we could go no further than the statute relied on, it would seem that appellant's argument could not be answered, for surely it is within the power of the legislature to define

jeopardy and the rights and privileges of one charged and convicted, although it be under an information defective in form or substance.

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *Brown v. New Jersey*, 175 U. S. 172.

Rem. & Bal. Code, § 2113, is an inheritance from the earlier practice acts and was first codified in the code of 1881, § 768. As is too often the case, the legislature has since assumed to legislate upon the same subject without particular reference to existing statutes. In 1909, an act entitled, "An act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime, and repealing certain acts," was passed. Id., § 2553 *et seq.* This act is known as the criminal code. It is there provided:

"No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information, and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense." Laws 1909, ch. 249, p. 909, § 64; Rem. & Bal. Code, § 2316.

This provision is admittedly hostile in words, in purpose, and intent to § 2113. The act of 1909 is a later enactment and is controlling, unless it can be said that the title to the act of 1909 is not broad enough to warrant a holding that former acts are repealed, or sufficient to sustain § 2316. The question of the sufficiency of the title of the criminal code is raised by Mr. Remington, the codifier of Rem. & Bal. Code. (See foot notes §§ 2304, 2353). It is our judgment that the title is sufficient. The words "relating to crimes and punishments, and the rights and custody of persons accused or convicted of crime" are broad enough to indicate a legislative intent to cover the entire subject of crimes and procedure. Under the words "relating to crimes and punish-

ments," there can be no doubt of the right of the legislature to define crimes and fix punishments, and the words "relating to . . . the right . . . of persons accused . . . of crime," are likewise sufficient to sustain provisions defining the rights and privileges of persons accused of crime and the procedure to be followed in determining such rights and privileges. It has been so frequently said by this court that the title of the act does not have to be an index to the body of the act that we will not resort to a multiplicity of authorities. It is enough if the title is sufficient to indicate to a person making due inquiry that the act may cover the subject of inquiry. *State ex rel. Jones v. Clausen*, 78 Wash. 103, 138 Pac. 653. When so tested, we have no doubt of the sufficiency of the title. Or, if our argument be so far unsound and there be no express repeal, § 2113 must necessarily be held to be superseded and repealed by implication. Repeals by implication are not favored, but are freely admitted where it appears that the legislature intended to cover an entire subject of legislation. *Bradley Engineering & Mach. Co. v. Muzzy*, 54 Wash. 227, 103 Pac. 37; *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 104 Pac. 791; *State v. Whitney*, 66 Wash. 473, 120 Pac. 116; *State v. Hewitt Land Co.*, 74 Wash. 573, 134 Pac. 474. But whether we hold that § 2113 has been expressly repealed as a provision inconsistent with § 52 (Id., § 2304) of the criminal code, or is repealed by implication, our conclusion makes the law of this state consistent with the rule prevailing everywhere unless it has been interfered with by statute.

After stating the rule of jeopardy, Mr. Cooley in his work on Constitutional Limitations (7th ed.), pages 468-470, says:

"If, however, the court had no jurisdiction of the cause, or if the indictment was so far defective that no valid judgment could be rendered upon it, or if by any overruling necessity the jury are discharged without a verdict, which might happen from the sickness or death of the judge holding the court, or of a juror, or the inability of the jury to agree upon a verdict after reasonable time for deliberation and effort; or

if the term of the court as fixed by law comes to an end before the trial is finished; or the jury are discharged with the consent of the defendant expressed or implied; or if, after verdict against the accused, it has been set aside on his motion for a new trial, or on writ of error, or the judgment thereon been arrested,—in any of these cases the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection."

"In England an acquittal upon an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported a conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal; and this rule has generally been followed in the United States, except in cases expressly governed by some constitutional or statutory provision on the subject." 12 Cyc. 264.

"A prisoner, in legal contemplation, is never in jeopardy upon an indictment invalid in itself." Syllabus, *Pritchett v. State*, 2 Sneed (34 Tenn.) 285.

"M. was indicted, tried, convicted, and sentenced to the penitentiary; the judgment was appealed from, the indictment held defective, and a subsequent indictment having been found against him, he pleaded the former conviction. *Held* —That the plea was not good." Syllabus, *Mount v. Commonwealth*, 2 Duvall (Ky.) 93.

After reviewing the common law authorities as well as modern texts and authorities, the supreme court of Mississippi, in *Kohlheimer v. State*, 39 Miss. 548, said:

"It seems to be clear, therefore, upon principle, as well as authority, that neither at common law nor by our constitution will an acquittal or conviction (where the penalty has not been inflicted) upon a *void* proceeding or indictment operate as a bar to a subsequent indictment for the same offence."

See, also, *Garvey's case*, 7 Colo. 384; *Case of William Vaux*, 4 Coke 40-47; *Regina v. Goddard*, 2 Ld. Raymond 920; *Armstrong v. Lisle*, 1 Salk. 60; *United States v. Gibert*, 2 Sumner (U. S.) 19; 1 Bishop, New Criminal Law, § 1020, par. 4; 1 Wharton, Criminal Law (11th ed.) § 396.

In *Vaux's* case, the defendant was acquitted of a charge of poisoning and had judgment *quoad est sine die*. He was thereafter indicted for the same offense and pleaded *autrefois acquit*. It was held that, although it were a maxim of the common law that no man should be twice put in jeopardy for the same offense,

"Yet it is intendable of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy." 4 Coke 44; 2 Hale P. C., p. 248.

"Where the first attainder is reversed for error, after which it can neither be pleaded to a prosecution for the same or any other felony; because by such reversal the attainder is of no more force than if it had never been; and if an acquittal on an erroneous indictment or appeal will not bar a subsequent prosecution, surely *a fortiori* an attainder reversed will not do it. But it is agreed to be a good bar while it stands unreversed, because it is not void but voidable only." 2 Haw. P. C. ch. 36, p. 323, § 2.

"But it seems clearly settled, that whenever the record on which a man is convicted of manslaughter, and admitted to his clergy, on an indictment or appeal of murder, is erroneous, either in respect of insufficiency in the indictment or appeal, or for a mistrial, etc., so that his life was not in danger at the trial, etc., he cannot plead such conviction and clergy thereon had in bar of a second indictment or appeal." Id., § 15.

Appellant is met by another rule. It is generally held that, where a judgment of conviction is set aside on motion of a defendant, he cannot then be held to urge his jeopardy.

"In prosecuting his former writ of error plaintiff in error voluntarily accepted the result, and it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy." *Murphy v. Massachusetts*, 177 U. S. 155.

"Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new

indictment against them, need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted. *Hopt v. Utah*, 104 U. S. 631, 110 U. S. 574, 114 U. S. 488, 120 U. S. 430; *Regina v. Drury*, 3 Cox Crim. Cas. 544, S. C. 3 Car. & Kirw. 193; *Commonwealth v. Gould*, 12 Gray 171." *United States v. Ball*, 163 U. S. 662, 671.

See, also, 1 Bishop, New Criminal Law, § 1027, par. 4; 1 Wharton, Criminal Law (11th ed.), § 396.

"It would be a contradiction in terms to say that a person was put in jeopardy by an indictment under which he could not be convicted, and it is obviously immaterial whether the inability to convict arise from a variance between the proof and the indictment, or from some defect in the indictment itself." *People v. McNealy*, 17 Cal. 333.

No man should be permitted to plead an abatement or bar because no crime is charged, and then in turn plead a former acquittal upon the theory of jeopardy and trial, for by his own plea he has made that which was voidable only void in fact and of a quality of which the law will take no account.

Our holding is that there is no jeopardy until one accused of crime is put to trial upon an information sufficient in form and substance to charge a crime, or, both informations being sufficient, the evidence adequate to the one information will equally sustain the other. *State v. Dye*, 81 Wash. 388, 142 Pac. 873.

In passing upon the case when it was first before this court, we directed that it be remanded with instructions to dismiss. Rem. & Bal. Code, § 1749, was not called to our attention. We should have remanded the case for further proceedings. Appellant's legal rights and his status under the law is the same as if a proper order had been entered, for, as will be seen by reference to the texts and authorities which have been cited, the court had power to try appellant without ref-

erence to § 1749; or, in other words, § 1749 is but declaratory of an accepted and settled rule of procedure.

We find no error in the record. Affirmed.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 12346. Department One. February 11, 1915.]

W. M. LAMB *et al.*, *Respondents*, v. J. F. CONNOR, *Appellant*.[1]

PARTIES—DEFECT OF PARTIES PLAINTIFF—OBJECTION—WAIVER. An objection to defect of parties plaintiff and that plaintiff is not the real party in interest must be taken by demurrer or answer, and is too late when raised for the first time on appeal.

INSURANCE—ACTIONS FOR PREMIUMS — PARTIES — AGENTS — REAL PARTY IN INTEREST. An insurance agent who extends credit for insurance written by him, and is held responsible therefor by the company, is subrogated to all the rights of the company in the premiums, and may sue therefor without assignments thereof.

INSURANCE—ACTIONS FOR PREMIUMS—EVIDENCE — ADMISSIBILITY. In an action to recover insurance premiums, written to secure a contractor engaged in repairing the building, evidence that the contractor had filed a lien on the building and foreclosed it, is competent to show his contractual relations and mutual interests in the property insured.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 5, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action to recover premiums due on insurance policies. Affirmed.

C. W. Hodgdon, for appellant.

William E. Campbell, for respondents.

CHADWICK, J.—In the spring of 1911, one Knack was engaged in repairing and remodeling a building belonging to the appellant. To secure him as the work progressed, appellant requested the respondents to insure the building. At

[1]Reported in 146 Pac. 174.

the end of the year, respondents testified, and the jury found, although it is denied, that appellant went to the office of the respondents and directed a renewal of the policies. No part of the premiums were paid by the appellant. Suit was brought in the superior court, and a judgment rendered in favor of respondents for the full amount due.

It is first contended that the respondents, who were the agents of the insurance companies issuing the policies, are not proper parties plaintiff. This objection is not well founded, for two reasons: An objection that the plaintiff is not a proper party plaintiff and is not the real party in interest cannot be raised for the first time in this court. The objection must be taken by way of demurrer or answer. Rem. & Bal. Code, par. 4, § 259 (P. C. 81 § 225); *Budlong v. Budlong*, 48 Wash. 645, 94 Pac. 478; *Harris v. Johnson*, 75 Wash. 291, 134 Pac. 1048.

It is quite generally held, in fact it seems to be held in all late cases, that an agent who, in discharge of his obligations to his principal, pays the debt of the other contracting party to his principal may be subrogated to the right of the principal to maintain an action.

"When an insurance company looks to its general agent for the premiums on insurance written by him, the agent is the owner of the debt, arising by his extending credit for the premiums, so that on payment thereof he is subrogated to all the rights of his principal in the premiums, entitling him to sue therefor. *Waters v. Wandless* (Tex. Civ. App.), 35 S. W. 184; *Bang v. Farmville I. & B. Co.*, 2 Fed. Cas. 585; *Willey v. Fidelity & Cas. Co.*, 77 Fed. 961; *Gaysville Mfg. Co. v. Phoenix Mut. Fire Ins. Co.*, 67 N. H. 457, 36 Atl. 367. See, also, *Overholt v. Dietz*, 43 Or. 194, 199, 72 Pac. 695. No assignment of the premiums is necessary to enable the agent to recover. *Gillett v. Insurance Co. of North America*, 39 Ill. App. 284." *Harrison v. Birrell*, 58 Ore. 410, 115 Pac. 141.

The testimony shows that the insurance companies held respondents responsible for their payment of the premiums on all policies written by them.

It is next contended that the court erred in permitting the witness Knack to testify that he had filed a lien upon the property of the appellant and had foreclosed it. It is insisted that this was error and tended to prejudice the jury against the appellant.

The testimony may have had a tendency to discredit, but the test remains, whether it is material upon any phase of the case. The inquiry whether Knack was acting as the agent of the appellant became material upon appellant's own theory of the case. The testimony was competent to show their contractual relations and mutual interest in the property covered by the policies.

The third assignment is that the testimony does not sustain the verdict. There is a sharp conflict. Respondents testified that the contract for the insurance and for the renewal was made by appellant. Appellant denies absolutely that he had any conversation with respondents or made any contract with reference to a renewal of the insurance. The jury believed the respondents and disbelieved the appellant. There is no merit in the last assignment.

The judgment is affirmed.

MORRIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 12467. Department One. February 11, 1915.]

CALVIN PHILLIPS & COMPANY, *Appellant*, v. H. O. FISHBACK, *as Insurance Commissioner, Respondent*.[1]

INSURANCE—REBATES—CONTRACT — CONSTRUCTION. An agreement in an application for a loan made to a loan company (also a licensed insurance agent) providing that "I hereby agree . . . in consideration of the services rendered . . . to compensate them, if said loan is secured, by granting them the exclusive right as insurance agents to write, or have written, all the fire insurance carried on the buildings," is not an agreement for unlawful insurance rebates, in violation of 3 Rem. & Bal. Code, § 6059-33, prohibiting licensed agents from "offering, promising, allowing, giving, or paying, directly or indirectly, any rebate of the premium payable on the policy . . . or any other valuable consideration or inducement to or for insurance . . . which is not specified in the policy contract of insurance" (MOUNT, J., dissenting).

INJUNCTION—WHEN LIES — ADEQUATE REMEDY AT LAW — INSURANCE—CANCELLATION OF LICENSE. Where the insurance commissioner is about to unlawfully cancel the license of an insurance agent, private rights are threatened for which there is no adequate remedy other than injunction.

INSURANCE—REGULATION—REBATES—STATUTES — CONSTRUCTION. 3 Rem. & Bal. Code, § 6059-33, an act intended to maintain an absolute standard of insurance rates, with the severe penalty of cancellation of an agent's license for violation thereof, will not be extended by judicial construction beyond its evident purpose.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered July 24, 1914, in favor of the defendant upon the pleadings, dismissing an action to restrain the insurance commissioner from canceling insurance licenses. Reversed.

Robert F. Booth, John P. Hartman, and *Arthur E. Nafe*, for appellant

The Attorney General and *Edward W. Allen, Assistant*, for respondent.

[1]Reported in 146 Pac. 181.

HOLCOMB, J.—This cause comes here upon an appeal by plaintiff from a judgment by the superior court of Thurston county, upon motion by defendant, respondent here, for judgment upon the pleadings, which motion was granted by the court below and the cause dismissed with prejudice, but later, upon application of the respondent, an order was granted allowing the restraining order to remain in force during the pendency of the appeal.

Appellant, holding licenses to write insurance as an agent in the state of Washington for two insurance companies, instituted the action in the superior court of Thurston county against the respondent as insurance commissioner, alleging, among other things, that the insurance commissioner was about to cancel its licenses; and thereupon obtained a temporary restraining order to prevent such action. The restraining order was kept in full force and effect up to the date of the entry of the judgment of dismissal referred to.

Thereafter, by permission of the court, appellant filed its amended complaint, alleging, among other things, that it was a corporation of the state engaged in real estate, loan, and insurance business, at Seattle and Tacoma, had licenses issued by the insurance commissioner, and that the commissioner had threatened to cancel said licenses for alleged rebate. Among other things pleaded in the amended complaint, and which is admitted by the motion for judgment on the pleadings, is that the appellant in conducting its business would find applicants for loans, would take written applications, a copy of the form of which is attached to the amended complaint, which would give the character of the security, the amount of the loan, the terms and rate; and at the same time, if it could procure it, obtain an agreement by which the borrower would agree that the appellant should write the insurance during the term of the loan, and the insurance was always written at the regular board rates without any reduction or rebate; and that usually the borrower agreed to have the appellant write the insurance, but sometimes would

not, and the loan might or might not be accepted; that the carrying of insurance became a valuable part of the security behind the loan, and that, if the appellant did not have the privilege of writing the insurance, its security was lessened and it would not be so well protected, and in all instances it did not cost the borrower any more or less, as he paid no extra premium and received no inducement for placing the insurance; and that it is a universal practice, carried on by loan agents of the state, to obtain the insurance in the manner aforesaid and for the single purpose of augmenting the security.

Respondent filed his amended answer to the amended complaint, admitting, denying, and setting up an affirmative defense alleging that the appellant rebated, and that the contract for insurance made a rebate arrangement; and at the same time, served and filed a motion for judgment upon the pleadings, dismissing the action, and for such other and further relief as to the court seemed proper. The motion was based upon the records and files in the case. Appellant served and filed its reply, denying that its manner of conducting business as pleaded in the answer constituted rebating or any violation of the insurance code, and denied that it charged borrowers less commissions because of writing the insurance, etc.

The form of agreement which each applicant for a loan is requested and solicited to sign, before his application will be acted upon, contains the following language:

"Agreement by..... as to expenses and compensation to Calvin Phillips & Co., in connection with proposed loan of $.....

"Seattle, Wash., ..., 19....

"Whereas, I have this day applied to and through Calvin Phillips & Co., for a loan of $..... to be secured by a first mortgage on property in King county, described as follows, to wit:

"I hereby agree, for myself, my heirs, executors, successors, or assigns, in consideration of the services rendered and

to be rendered by the said Calvin Phillips & Co., to compensate them, if said loan is secured, by granting them the exclusive right as insurance agents to write, or have written, all the fire insurance carried on the buildings on the above described property during the life of said mortgage, and as additional compensation to pay a cash commission of..... per cent. of the amount of said loan, equal to $....."

The insurance commissioner, acting under advice of the *Attorney General*, construed such transactions, as evidenced by the foregoing form of agreement, as rebating, under the terms and provisions of Laws of 1911, ch. 49, p. 195, § 33 (3 Rem. & Bal. Code, § 6059-33), which is as follows:

"No insurance company, by itself or any other party, and no licensed insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy, or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for insurance, or any risk in this state now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such company, agent, solicitor, or broker, personally or otherwise offer, promise, give, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy. . . . ."

The *Attorney General* lays great stress upon the words in the said statute, "shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, *or any other valuable consideration or inducement* to or for insurance, . . . which is not specified in the policy contract of insurance;" and also lays great stress upon the language of the form of agreement used by the appel-

lant in its transactions, "in consideration of the services rendered . . . to compensate them, if said loan is secured, by granting them the exclusive right as insurance agents to write, or have written, all the fire insurance carried on the buildings," etc. This, respondent contends, constitutes direct inducement and consideration from the appellant as an insurance agent to such borrowers, for the writing of fire insurance.

With the issue involved in this case, we find no authorities exactly pertinent or analogous. Respondent relies largely upon the holdings in the cases of *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595, 49 L. R. A. (N. S.) 147, and *Ferguson-Hendrix Co. v. Fidelity & Dep. Co.*, 79 Wash. 528, 140 Pac. 700. But in those cases we merely held, in accordance with fundamental principles of law, that one cannot avoid his contractual obligations because of his own violation of statutes regulating the conduct of the business under which the contract was made. To the same effect are the decisions in *Key v. National Life Ins. Co.*, 107 Iowa 446, 78 N. W. 68, and *Interstate Life Assurance Co. v. Dalton*, 165 Fed. 176, 23 L. R. A. (N. S.) 722.

With respect to the vigorous attack of appellant upon the policy of the law, we have only to say that the legislature deemed it advisable to enact this law regulating insurance and insurance companies and agents, and establishing a department of government for the supervision thereof. We will not speculate as to the policy thereof, or attempt to dictate or outline the general policy or course of conduct of said department. *People v. Formosa*, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. 612. In this instance, however, we are of the opinion that private rights are threatened with undue invasion by the insurance commissioner, in excess of his authority, and that the appellant has no adequate remedy other than that invoked herein.

With respondent's contention we cannot agree. If the inducement and consideration flowing from the appellant in

such transactions constitutes any inducement or favor for anything, it is for the granting of a loan or loans. As between the agent and the insured, it is rather a detriment than a rebate, benefit, favor, or inducement to the insured. There is no pretense that any premium other than the established or "board rates" of insurance is ever charged by appellant in its transactions.

The evident intent of the statute in question is to establish uniform rates of insurance throughout the state, and to maintain an absolute standard of insurance rates. The language of the statute is broad and the penalty for violation thereof is severe, viz., the cancellation of the license of the insurance agent who violates it. We shall not extend its provisions by judicial construction beyond its very evident scope and purpose. Forfeitures are not favored by the law, and, so far as we can see, there is no violation of the provisions of said statute by such transactions as those now under consideration.

The judgment of the lower court is reversed, and the cause remanded with instructions to grant the permanent injunction prayed for against respondent.

MORRIS, C. J., CHADWICK, and PARKER, JJ., concur.

MOUNT, J. (dissenting)—It is conceded in this case that the appellant is a licensed insurance agent, and also engaged in negotiating loans of money in this state. It is also conceded that, when an application is made for a loan of money, the applicant is required to sign the agreement set out in the majority opinion to the effect that, in consideration of services to be rendered by the appellant, if the loan is made, the applicant will compensate them by granting the exclusive right to write all fire insurance carried on the building covered by the security, and in addition pay a cash commission.

The statute provides:

"No licensed insurance agent . . . shall offer . . . any rebate of . . . the premium payable . . . or any

other valuable consideration or inducement to or for insurance . . . or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy." 3 Rem. & Bal. Code, § 6059-33.

The statute is broad in its terms and was intended to prevent rebating in any form of the premiums upon insurance policies; so that insurance policies should be independent of all other considerations than those expressed upon the face of the policy. When an insurance agent exacts a promise of insurance as a consideration for a loan of money, he is certainly offering a valuable consideration and an inducement for the insurance. This seems to me to be too plain to admit of serious discussion. If insurance agents may, under the statute quoted in the majority opinion, offer loans, or services in procuring loans, or an advantageous sale of real estate, as an inducement for insurance contracts, then they may offer articles of merchandise, or any other thing of value. If an insurance agent should say to a client desiring insurance:

"I can give you no rebate upon the insurance premium which must be paid in full in cash, but if you will grant me the exclusive right to insure your buildings I can procure for you a loan of money which you may need,"

could it be reasonably said that this transaction would not be an inducement for the insurance? Plainly not. And yet it seems to me this is exactly what the majority say is legal under the statute. If so, the statute is of no force.

I am satisfied that the trial court properly construed the statute, and that the judgment should be affirmed. I therefore dissent.

On Rehearing.

[Decided March 26, 1915.]

Per Curiam.—Subsequent to the filing of the opinion in this case, a petition for rehearing was filed by respondent in which it was suggested that, inasmuch as the license of the appellant would expire April 1, 1915, and under the

law, unless the case was reversed, a license would not be reissued for the ensuing year, the cause, should the petition be granted, instead of being heard upon oral argument, be submitted to the entire court upon the petition for rehearing and briefs in order that a decision might be reached prior to April 1st. This has been done, and upon such rehearing a majority of the court adhere to the views as expressed in the former opinion. For the reasons therein stated, the judgment is reversed.

[No. 12484. Department One. February 11, 1915.]

HENRY C. BOGER, *Respondent*, v. A. L. BELL *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—TENDER — SUFFICIENCY. The deposit of money to meet payments due on a land contract is not a sufficient tender, where no notice of the deposit was given and the deposit was not made to the credit of the adverse party.

SAME — CONTRACT — DEFAULT — FORFEITURE. After notice of forfeiture of a contract for the sale of land for default in payments, the vendee cannot reinstate the contract by a tender, or assert that tender was unnecessary because it appears that it would have been futile.

SAME—CONTRACT—FORFEITURE—WAIVER. The granting of one extension for a definite time for the payment of the first installment upon a contract for the sale of land does not waive the covenant that time is of the essence of the contract, or prevent a forfeiture after a fair opportunity was offered to meet the contract.

SPECIFIC PERFORMANCE — CONDITION PRECEDENT — TENDER OF PURCHASE PRICE. While a vendor cannot declare a forfeiture of an executory contract at a time when he is unable to convey title in conformity with his agreement, still if he does so, the vendee cannot sue in equity for a specific performance without paying or offering to pay the purchase price; and in the absence of proof of willingness and ability to pay the price, the action must be dismissed.

[1]Reported in 146 Pac. 179.

Appeal from a judgment of the superior court for Mason county, Claypool, J., entered May 1, 1914, in favor of the plaintiff, in an action for specific performance, tried to the court. Reversed.

Troy & Sturdevant, for appellants.

R. A. Lathrop and *D. F. Wright*, for respondent.

CHADWICK, J.—Appellants contracted to sell to respondent, at a future date, certain land situate in Mason county, in consideration of the sum of three thousand dollars, to be paid in the manner following: eight hundred dollars on the agreed date of sale and the balance in deferred payments extending over a term of years. The contract provided that the full purchase price could be paid at any time. The first payment was made. Respondent, being unable to meet the second payment when due, asked for and was granted an extension of time. At the expiration of the extended time, respondent asked for a further extension. After some discussion running over a period of six or seven weeks, appellant wrote respondent, saying:

"I have heard from my brother in regard to the land and he thinks as I do that it would not be just to give you an unlimited time to dispose of your interest. He regrets that you could not complete the contract but thinks it no fault of ours.

"I now have lot 10 of section 15, township 21 north of range 4 west, 24.75 acres, that lies at the northeast corner of the land you had, between the turn in the road and the river.

"If you would care to do so, I can make you a proposition for this land and make an allowance on what you paid on the other.

"The character of land is the same and as the Purdy Canyon road will be built this year there should be plenty of work there."

Immediately, or one day after receiving this letter, respondent caused enough money to be deposited in the bank at Shelton to meet all payments due and to become due under

the contract. It is alleged that appellant A. L. Bell was notified that the money was subject to his order and that he refused to accept it. This is denied, and there being no testimony whatever to sustain the allegation, we are compelled to hold that there was no tender or offer of performance on the part of respondent. It has been held that the deposit of money in a bank to the credit of an adverse party and notifying him thereof does not constitute a sufficient tender in law. *Robinson v. Thoma*, 30 Wash. 129, 70 Pac. 240. In this case, there is no proof of notice, nor does it appear that the money was deposited to the credit of the adverse party.

Respondent seeks to justify his demand for a decree by reference to the principle that proof of tender will not be required where it appears that it would have been futile. *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886; *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956; *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125; *Rodda v. Needham*, 78 Wash. 636, 139 Pac. 628; *Keene v. Zindorf*, 81 Wash. 152, 142 Pac. 484. The rule does not pertain where a forfeiture has been declared by the vendor acting within the terms and limit of the contract prior to the time of tender. A vendee in default cannot reinstate himself or his contract by a tender after the vendor has asserted his right of forfeiture.

Counsel contends that although these things may be so, yet, nevertheless, the decree of the court should be sustained, because appellants, by their course and conduct, have waived the contract and cannot now rest upon the covenant that time is of the essence of the contract, and that respondent was entitled to a reasonable time to pay the balance due upon the contract. *Shorett v. Knudsen*, 74 Wash. 448, 133 Pac. 1029, and *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 110, 134 Am. St. 1096, are relied on. These cases are to be distinguished. In each of them it appeared that the vendor, by a course of indulgences inconsistent with the right to declare a forfeiture, had waived the privilege of declaring a forfeiture under the

"time" covenant of the contract. Here there was no extension or indulgence which can in any way be held to be inconsistent with the right. The only extension that was given was made at or about the due date of the first payment. It was for a definite time. When it and another payment became due and after a fair opportunity offered to meet the contract, and not until then, did appellants claim a forfeiture. Such conduct is not in derogation of the right to forfeit, but is consistent with it. There was no misleading on the part of appellants, nor was respondent lulled into a security of mind which, if broken, would result in inequity. It is upon this distinction that the case of *Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036, rests.

To hold that an extension of a payment to a day certain relieves a contract of its penal clauses would tend to a denial of indulgences and to strict enforcement and forfeitures. It is only where it can be said that the conduct of the vendor is such as to indicate a purpose to waive the forfeiture clause that the right will be denied. We do not want to be understood as holding that such purpose must be proved by more than a bare preponderance of the evidence, for as equity does not favor forfeitures, so will slight evidence arrest the attention of the chancellor.

Finally, it is contended that the decree must be affirmed because it appeared upon the trial that appellants had not at that time title to the land, and were not at the time of the forfeiture in position to meet their covenant to convey "by deed of conveyance . . . with covenants of warranty." Appellants held the land under contract from the state of Washington, upon which payments had been made but no deed executed. The general rule that a vendor cannot declare a forfeiture under an executory agreement to convey land unless he is prepared to make a deed in conformity with his agreement, is well settled. Where title fails, a vendee can sue in damages, or he can waive the agreement to convey by a deed in form and take the title the vendor has at the time,

but he cannot do so unless he in turn keeps his own covenant to pay the purchase price. There is no evidence to warrant a finding that respondent ever at any time paid or offered to pay the amount due. He did not tender the amount due at the trial nor has he paid it into court for the use and account of appellants.

Decrees in equity should be final. They will not be granted in defiance of contracts or to modify their terms. When they will not aid or effectuate the contract sued upon and its outgrowing equities, they will be denied. When measured by these rules, the decree in the instant case cannot stand. It wants in equity. Appellants are bound to convey, but respondent may still decline to purchase. The mutuality of the contract is destroyed. The decretal words are,

"That the defendants execute a warranty deed to the premises described in the complaint, to wit: The southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 16, Township 21, North Range 4 West, W. M., and also that the plaintiff do have and recover of and from the defendants their costs and disbursements herein taxed at $54.50."

The rule invoked does not and cannot apply to an action for specific performance where the vendee is seeking to compel the execution of a deed. We may grant that a tender was waived, but it does not follow that a conveyance can be compelled in a court of equity until the purchase price has been paid, either by actual payment to the vendor, or constructively by payment into the registry of the court to satisfy a decree if rendered. If it were not so, a decree such as was entered in this case would not change the contract relations in any way except that compulsion would be put on the vendor, while the payment of the purchase price would remain optional with the vendee.

We cannot modify the decree to meet the proof for there is no testimony even tending to show that respondent is ready, able and willing to pay the purchase price. We are

compelled, therefore, to reverse the judgment of the lower court.

Reversed and remanded with instructions to dismiss.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 11671. Department Two. February 13, 1915.]

JOHN PRENTICE, *Appellant*, v. FRANKLIN HOW *et al.*, *Respondents*.[1]

EXECUTION — SALES — ASSIGNMENT OF CERTIFICATE—RECITALS OF DEED. The recital in a sheriff's deed to the effect that it is issued to the grantee as assignee of the holder of the sheriff's certificate of sale is not binding upon persons who are not parties to the deed; and it is not evidence that the sheriff was authorized to execute the deed to the assignee, as against the holder of the certificate.

SAME — SALES — ASSIGNMENT OF CERTIFICATE—SHERIFF'S DEED—VALIDITY. A sheriff's deed on execution sale reciting that the certificate of sale has been assigned to the grantee, who was the attorney for the holder of the sheriff's certificate of sale, an alien at that time absent from the United States, is insufficient to pass the title to the land sold to the attorney or his heirs, where it appeared that the certificate of sale had not been assigned to, and no consideration had been paid by, the attorney, who had evidently taken that step in an effort to protect his client, and had attempted to execute a 99-year lease to the client, and had paid taxes in the client's name and during his absence for many years, and had left his client's lessees in possession of the property.

ADVERSE POSSESSION—ALIENS—COLOR OF TITLE—SHERIFF'S CERTIFICATE OF SALE—PAYMENT OF TAXES. A sheriff's certificate of sale to an alien, coupled with an assignment thereof and a quitclaim deed from the alien to a citizen, on which a sheriff's deed was issued to the assignee, constitutes a complete chain of title; or at least color of title upon which a complete title is vested by adverse possession and payment of taxes for more than seven years.

ALIENS—TITLE TO REAL ESTATE—RIGHT TO QUESTION. The right of an alien to hold real estate contrary to the prohibition of art. 2, § 33, of the state constitution can be questioned by the state alone, and where the state fails to move in the matter until after conveyance by the alien to a citizen, the right to raise the question of title is foreclosed.

[1]Reported in 146 Pac. 388.

Appeal from a judgment of the superior court for Franklin county, Mills, J., entered July 1, 1913, in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

H. B. Noland, for appellant.

D. B. Horrigan and *Driscoll & Leonard*, for respondents.

Crow, J.—This action was commenced by John Prentice against Franklin How, a minor, Wong How, his guardian, Wong How and Ong How, his wife, and Horrigan Brothers Company, a corporation, to recover possession of and quiet title to lot 12 in block 3, Northern Pacific Railroad Company's plat of Pasco. From a decree in favor of the defendants Franklin How and Horrigan Brothers Company, a corporation, the plaintiff has appealed.

Wong How, one of the defendants herein, is a Chinaman and an alien. Franklin How, a minor, son of Wong How and his wife, is a native of the United States and the state of Washington. The issue presented is whether the title to, and ownership of, lot 12 in block 3, the lot in question, is in the appellant John Prentice or in the minor defendant, Franklin How. The trial court decreed the legal and equitable title to Franklin How. As Horrigan Brothers Company, a corporation, holds as lessee of Franklin How, and its rights are dependent upon and protected by the title which was decreed to Franklin How, no further notice need be taken of it. Franklin How not only claimed title through his father Wong How, but also pleaded title by adverse possession under several statutes of this state. Our conclusion is that he maintained each and every defense pleaded. We shall, therefore, discuss but one of his sources of title, which we find sufficient to sustain the final decree.

On the trial, it was agreed that the Pasco Union Land Company, a corporation, hereinafter called the land company, was the common source of title. The record shows beyond question, that the land company held title to and owned

several thousand lots in the city of Pasco; that, although Wong How, father of Franklin How, for many years claimed to be the owner of lot 12 in block 3, and was in possession thereof, the record legal title thereto also stood in the name of the land company. It appears that, prior to the year 1896, one R. Olney, now deceased, husband of L. L. Olney, also now deceased, held certain claims against the land company; that he assigned these claims to M. W. Olney, his daughter, who commenced an action against the land company to recover the same; that on May 5, 1896, she recovered a judgment against the land company for $11,336 and costs; that an execution issued thereon was levied upon the lots owned by the land company, and also on lot 12, block 3, the title to which stood in the name of the land company, although at that time the lot was in the possession of Wong How who claimed ownership; that in due course the lots were all sold under the execution at sheriff's sale; that, at the sheriff's sale, Wong How, to protect his claim of ownership and possession, purchased lot 12, block 3, for $165; that a few other lots were purchased for small amounts by other parties; that all the remaining lots, several thousand in number, were purchased by M. W. Olney, the judgment creditor; that the sale was duly confirmed; that certificates of sale were issued to the purchasers, including a separate certificate of sale to Wong How for lot 12, block 3; and that, under Wong How's certificate of sale, the appellant, John Prentice, and the respondent Franklin How both claim title.

Appellant claims title under the Wong How certificate of sale in the following manner: It appears that, on January 24, 1899, J. J. Davis, then sheriff of Franklin county, in pursuance of the Wong How certificate of sale, executed and delivered to R. Olney a sheriff's deed for lot 12, block 3. This deed, which was introduced in evidence and is now before us as an exhibit, was never recorded, nor does it have attached any certificate of the clerk of the superior court that it had

been presented to him, or entered upon the book of levies. The deed contains the following recital:

"And Whereas, at said sale Wong How became purchaser of the real estate hereinafter described, for the sum of $165, by reason of his being the highest and best bidder therefor at said sale; and

"Whereas, afterwards, to wit: The 16th day of July, A. D. 1896, for a valuable consideration, the said Wong How sold, assigned and transferred all his right, title and interest in and to the hereinafter described real estate to R. Olney, the herein named party of the second part; and

"Whereas, said sale has been in all things confirmed by the said superior court, and the time for redemption having now fully expired, and no application having been made to redeem the hereinafter described premises; now therefore," etc.

After obtaining this deed and while the same was in his possession, R. Olney died intestate; his wife also died intestate, leaving M. W. Olney, their daughter, as their only heir at law. There never was any administration on their estate. After M. W. Olney had acquired title to the several thousand lots sold to her under the execution, taxes on her lots were permitted to become delinquent, foreclosure was had, and tax titles passed to Franklin county. It being supposed that these tax titles were defective and that a settlement could be made with the county, the appellant John Prentice obtained from M. W. Olney a quitclaim deed for all of her lots, paying a consideration of $125 therefor. This deed did not include lot 12 in block 3, as it had not been sold to M. W. Olney at the sheriff's sale. Later appellant obtained from M. W. Olney a quitclaim deed for lot 12, block 3, the record indicating that he represented to her that it had been omitted inadvertently from the first quitclaim deed. He now claims that she had inherited title to lot 12, block 3, as the heir at law of R. Olney and wife, who held title under the sheriff's deed executed and delivered to R. Olney during his lifetime, as above stated.

The record shows, that R. Olney was an attorney at law residing in Pasco; that he was the attorney for Wong How, who was in the possession of lot 12 in block 3, claimed its ownership, and held the sheriff's certificate of sale therefor. Wong How went to China about the year 1896, and remained there for eight years, until after the death of R. Olney. It was during his absence that R. Olney obtained in his own name the sheriff's deed above mentioned. Shortly thereafter, R. Olney and his wife executed a lease for ninety-nine years to Wong How, void for the want of an acknowledgment, which lease reads as follows:

"This indenture, made this 30th day of January, 1899, Witnesseth: That R. Olney and L. L. Olney, his wife, of Franklin county, state of Washington, lessors, do hereby lease, demise and let unto Wong How of Pasco, Franklin county, state of Washington, lessee, the following described premises situated in the county of Franklin, state of Washington, to wit: Lot 12 of block 3 in the Northern Pacific Railroad plat of the town of Pasco, together with all and singular the tenements, hereditaments and appurtenances thereunder belonging, to have and to hold the same, for the term of ninety-nine years, to wit: from the 30th day of January, 1899, to the 30th day of January, 1998, and yielding and paying therefor the sum of one dollar, the payment of which is hereby acknowledged. In witness whereof," etc.

Wong How was in China at the date of the execution of this lease, which with the sheriff's deed were found among the papers of R. Olney after his death, and had never been delivered. Shortly after the death of R. Olney, they came into the possession of his daughter, M. W. Olney. She caused them to be left with an agent of Wong How, who was in charge of his property during his absence in China. Wong How testified that he had never assigned the certificate of sale to R. Olney; that he never authorized the execution of a sheriff's deed to him; that he never received the ninety-nine-year lease, and that the instruments had never been delivered to him.

The title of respondent Franklin How was obtained in the following manner: After Wong How returned from China, under the authority of his certificate of sale, he and his wife Ong How, on the 25th day of February, 1908, by quitclaim deed, conveyed lot 12 in block 3 to the respondent Franklin How. This deed was duly acknowledged and recorded. Thereafter, on the 18th day of March, 1911, in pursuance of the certificate of sale and the quitclaim deed, J. W. Hays, then sheriff of Franklin county, executed and delivered to Franklin How a sheriff's deed for lot 12 in block 3, which deed contained the following recital:

"And Whereas, on the 25 day of February, A. D. 1908, Wong How, purchaser aforesaid, duly sold, transferred and assigned unto Franklin How, party of the second part, herein, a sheriff's certificate of purchase to the property hereinafter described, and set forth in this instrument of conveyance, and authorized and directed the said sheriff to issue a deed for the same to the said party of the second part herein instead of to him; and

"Whereas, since the making of said sale the said J. W. Hays, party of the first part, has succeeded to the office of sheriff of the county of Franklin, state of Washington, and is now such sheriff;

"Now, Therefore." etc.

This deed was duly acknowledged, was presented to the clerk of the superior court of Franklin county on the 21st day of March, 1913, was entered upon the book of levies, was afterwards recorded in the manner provided by law, and was authorized by Wong How. It is under the certificate of sale to Wong How, the quitclaim deed from Wong How to the respondent Franklin How, and the sheriff's deed to Franklin How, that Franklin How now claims to hold the legal title. The record further shows that Franklin How and Wong How, his predecessor in interest, have paid all taxes on the property since the year 1896, and until the time of the commencement of this action, with the possible exception of one or two years, for which years plaintiff, John Prentice, made

payment, before payment could be made by respondent or his predecessor in interest. The evidence further shows that Franklin How and his predecessor, Wong How, have been in the open, notorious, exclusive and adverse possession of the lot for more than twenty years prior to the commencement of this action; that they have exercised dominion over the same at all times, and that the lot has been improved with buildings, with the possible exception of about two years from early in 1903, during which period the first buildings were removed, and that other buildings were thereafter erected by Wong How or his lessee.

It is conceded that, on July 27, 1903, the date on which appellant, John Prentice, obtained his quitclaim deed for lot 12, block 3, from M. W. Olney, the value of the lot did not exceed $150; that he did not commence this action until December 16, 1912, and that on the latter date the value had increased to some six or seven thousand dollars. Many other facts appear in the record, all favorable to respondent, which we deem it unnecessary to state, the above being sufficient.

From this statement it is manifest that neither R. Olney, M. W. Olney, his heir at law, nor appellant ever acquired title to the property in dispute. Appellant failed to show that Wong How at any time assigned his certificate of sale to R. Olney. No deed appears of record. No assignment has been shown. Wong How denies that any deed or assignment to R. Olney was ever executed by him. The only intimation of any such assignment is the recital set forth in the sheriff's deed which was executed and delivered to R. Olney. This recital was not binding upon persons who were not parties to that deed. 13 Cyc. 612; *Carpenter v. Sherfey*, 71 Ill. 427; *Bosman v. Davis*, 39 Iowa 308.

If, in fact, no assignment had been made, the sheriff was without authority to execute and deliver a deed to R. Olney, and the failure to show such an assignment constitutes a missing link in appellant's alleged chain of title. The facts are that R. Olney was Wong How's attorney and confidential ad-

viser; that Wong How was an alien without the right to acquire title to real estate by purchase, under § 33, art. 2, of the constitution of this state. It is evident that R. Olney, during Wong How's absence in China, wished to protect his interests; that to do so he obtained the sheriff's deed in his own name; that the ninety-nine-year lease, thereafter executed by himself and wife, was in effect a declaration of trust in Wong How's favor, and that R. Olney held these papers at the time of his death, doubtless intending to use them in some manner for the purpose of protecting his client. These instruments were never delivered, and Wong How denies that they were authorized by him. They came into his possession without legal delivery, through M. W. Olney, the daughter of R. Olney, who caused them to be handed to a Chinaman who, as agent, represented Wong How while he was absent from the United States. In support of these conclusions, attention may be called to the fact that it further appears from the record that R. Olney made repeated payments of taxes on behalf of Wong How, in his name and during his absence, for many years. There is no evidence that R. Olney paid any consideration for an assignment of the certificate of sale or for the sheriff's deed. It is undisputed that, at all times prior to R. Olney's death, Wong How, by his lessees, was in possession of the property, and it clearly appears that appellant never paid any consideration whatever for his pretended title.

Referring to the title of Franklin How, this court has decided that a certificate of sale is color of title. *Philadelphia Mtg. & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501; *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170; *Johnson v. Bartlett*, 50 Wash. 114, 96 Pac. 833; *Goetter v. Moore*, 53 Wash. 5, 101 Pac. 365.

The certificate of sale to Wong How, the quitclaim deed from Wong How to respondent, and the deed executed and delivered by the sheriff of Franklin county to respondent, constitute a complete chain of title in respondent. These instruments at least constitute color of title which, with pos-

session and payment of taxes for more than seven years, was sufficient to vest a complete title in respondent. *Goetter v. Moore, supra.*

The record shows that appellant relies upon the sheriff's deed to R. Olney. He contends that Wong How's only interest was the ninety-nine-year lease, and that Wong How, an alien, could not acquire real estate by purchase under the constitution of this state. The only person who could question Wong How's claim or title while he held either a ninety-nine-year lease or a certificate of sale, was the state of Washington, it having authority to institute proceedings for a forfeiture. *Abrams v. State,* 45 Wash. 327, 88 Pac. 327, 122 Am. St. 914. No such proceedings were commenced by the state, and after Wong How conveyed to respondent, a native of the United States, the state of Washington itself could not maintain such an action against respondent. *State ex rel. Atkinson v. World Real Estate Commercial Co.,* 46 Wash. 104, 89 Pac. 471.

It is impossible to read this record without arriving at the conclusion that Franklin How, by his predecessors, has been in possession of the real estate for more than twenty years; that he holds a good record fee simple title, and that the appellant has no interest whatever. Other facts and arguments are presented and discussed in the record and briefs, but their discussion here would only fortify the conclusion we have reached.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 11989. Department Two. February 13, 1915.]

A. C. Eighme, *Appellant*, v. P. P. Holcomb *et al.*, *Respondents*.[1]

Sales—Contracts—Construction. Where a contract partly written on a printed form, for the sale of apples on consignment, provided in the printed part that the consignor agreed to pool his apples with other growers and sell for the pool price and that the factor "shall not sell any fruit for less than the minimum prices as hereinafter stated," leaving blank columns at the end of the printed form for the number of boxes, variety and minimum prices, which columns were not filled out, but the words were stricken and the space used for writing in an agreement whereby the consignee agreed to sell specified varieties for the pool prices of the factor, "with an advance on the following varieties," of certain specified sums, the written part fixing the agreement for advances cannot be construed as the "minimum price" mentioned in the printed form, since the latter words were evidently permitted to remain in the form by inadvertence and no minimum price was agreed to; the words "advance" and "minimum price" not being synonymous in any sense; and there being no provision of the contract expressly showing an intention to base the minimum price on the advances specified, there was no ambiguity in the contract.

Evidence—Parol Evidence—To Vary Writing. Parol evidence of experts to explain the terms of a contract is inadmissible when the contract is not ambiguous.

Contracts — Construction — Ambiguity. In a contract partly written on a printed form, more attention is paid to the written than to the printed part.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 1, 1913, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action on contract. Affirmed.

Reeves, Crollard & Reeves, for appellant.

Williams & Corbin, for respondents.

Crow, J.—This action was commenced by A. C. Eighme against P. P. Holcomb and Caroline H. Holcomb, his wife, to recover $1,439, which plaintiff claimed to be due him for

[1]Reported in 146 Pac. 391.

apples sold to the defendants in pursuance of a written contract of which the following is a copy:

"This is to certify that I hereby give to the Wenatchee Fruit Company authority to sell for me all the fruit listed below. Said option is given on the following conditions:

"First.—That my fruit shall be pooled and sold with fruit of various other growers, and I shall receive the same prices, according to grade and varieties of fruit, as other growers receive.

"Third.—That the said Fruit Company sell all fruit in any way it deems best to secure best prices obtainable, and shall not sell any fruit for less prices than the minimum prices as hereinafter stated by me under this agreement.

"Fourth.—If the price obtained for the fruit is greater than the minimum price set by me, I shall receive the price which the fruit sold for; the said fruit company shall receive for its services as a handling charge per box: Peaches and Cots, 2 cents; Pears, 5 cents; C grade apples, 5 cents; Extra Fancy and Fancy, 9 cents.

Estimated No. Boxes.	Variety	Minimum Price
Ex. Fancy	*Fancy*	
3½—4—4½	*3½—4—4½*	*5 T & C*

"I hereby agree to sell to the Wenatchee Fruit Company the following varieties of apples, for the pool price of apples of said Fruit Company, with an advance on the following varieties: $1.10 on Jnos. and W. Saps; 90c on Staymen W. Saps; $1.10 on Ark. Blacks; $1.50 on Delicious; 75c on Lumber Twigs; 75c on C Grade; Fruit to be packed according to association rules. *A. C. Eighme,*
"Wenatchee Fruit Co.,
"By P. P. Holcomb."

It is admitted that the defendant P. P. Holcomb was doing business for the benefit of the community consisting of himself and wife, under the name of Wenatchee Fruit Company. The contract, which was drawn upon a printed form or blank used by defendants, was partly printed and partly written. Some three or four words were typewritten. In order that the printed portion may be distinguished from that which was written or typewritten, we have italicized the latter. Plain-

tiff alleged that, by the terms of this contract, the defendants agreed to purchase his 1912 apple crop, stipulating to pay such sums as might be received by the defendants therefor after deducting certain expenses and charges; but that defendants thereby agreed that the minimum prices plaintiff should receive were the prices stated in the written portion of the contract. In substance, he further alleged that, at such minimum prices, he had delivered apples to defendants of the value of $3,847, and that defendants had only paid him $2,408 thereon. Defendants admitted the execution of the contract; denied that they agreed to pay minimum prices as alleged by plaintiff, and, in substance, affirmatively alleged that, under the pool price for the varieties of fruit handled, plaintiff would be entitled to the sum of $2,101.69; that defendants had paid him $2,470.50; that plaintiff was indebted to defendants in the sum of $289.55 for commissions for selling the apples; that the total credits to which defendants were entitled would be $2,760, and that defendants had overpaid plaintiff in the sum of $658.96, for which latter sum the defendants asked judgment. At the close of all the evidence, the trial judge directed a verdict in defendants' favor for $658.96, and entered judgment for that amount. The plaintiff has appealed.

During the trial of the action, the following stipulation was, by agreement of parties, admitted in evidence:

"It is hereby stipulated and agreed by and between the plaintiff and defendant that the plaintiff delivered to the defendant 2,263 boxes of C grade apples of the varieties named in the contract in evidence in this suit, being plaintiff's exhibit '1,' and that the plaintiff delivered to the defendant 1,960 boxes of fancy and extra fancy apples of the varieties mentioned in said exhibit '1;' and that if the defendant is entitled to any commission on the said apples, he is entitled to the sum of five cents per box on all C grades and nine cents per box on fancy and extra fancy, and that the total amount of said commissions would be the sum of $289.55. It is further stipulated and agreed that the plaintiff has received from the defendant the sum of $2,470.50 on said apples. It is fur-

ther stipulated and agreed that under the pool price of said apples the plaintiff would be entitled to the sum of $2,101.09; that the amounts paid to the plaintiff by the defendant were in the following sums and on the following dates: October 3rd, check $375.00; October 15th, check $750.00; November 14th, $300.00; November 30th, $265.00; December 14th, $300.00; December 19th, $58.00; December 19th, on order given Lamb-Davis Lumber Co., $62.50. It is further stipulated that the last delivery of said apples, consisting of 220 boxes, was made on the 15th day of November, 1912, and that all of the apples save and except said 220 boxes had been delivered prior to that date. It is further stipulated into the record that all of the dates mentioned in that stipulation just read refer to the year 1912."

The principal question on this appeal is the proper construction of the contract. Appellant first moved for a judgment on the pleadings, on the theory that the written contract fixed minimum prices on the fruit delivered. This motion being denied, appellant on the trial proceeded upon the theory that the contract was ambiguous in its terms, and offered two witnesses as experts to explain its meaning. Upon objection, their evidence was excluded. Appellant and one other witness testified that, before entering into the contract, respondents assured appellant that there would be no "come back" from appellant to respondents. This was denied by respondents. The evident theory upon which the trial court excluded the evidence of the experts and upon which he entered judgment was that the evidence offered and the evidence admitted was incompetent, as it tended to vary the terms of a written contract; that the contract was not ambiguous; that it did not fix minimum prices; that it expressly stipulated a sale at pool prices; and that appellant was liable for overpayments made to him in the way of advancements, and was also liable for commissions. After a careful consideration of the written contract, we conclude that the trial judge reached the correct conclusion.

As above stated, the contract was partly written and partly printed, and an examination of the original instrument, which

is before us as an exhibit, convinces us that no minimum price was stipulated, as appellant now contends. While it is true that clause three of the printed portion of the contract provides that the respondent shall not sell any fruit for less prices than the minimum prices "hereinafter stated," and clause four provides that, if the price obtained shall exceed the minimum price, the appellant shall receive the selling price, an examination of the entire contract makes it apparent that no minimum prices were fixed. Clause one of the printed portion expressly provides that appellant shall receive the same prices—pool prices—as other growers received, and the written portion expressly provides that appellant agrees to sell for the pool prices. Unless the word "advances," used in the written portion of the contract, can be construed to mean "minimum," and thereby provide for minimum prices, there can be no possibility of sustaining appellant's contention. The two words do not have any similarity of meaning. It is apparent that the written portion fixed advances which respondent would make to appellant, but that it did not provide for minimum prices. The printed words "minimum price" appear near the close of the printed portion of the document, but the form itself shows that below these words were four blank columns headed by the words "Cots, Peaches, Pears, Apples," with the evident intention of inserting minimum prices when agreed upon. This was not done. The words "Cots, Peaches, Pears, Apples" are stricken, and beneath such stricken words the written portion of the contract is inserted.

It is evident the words "minimum price" were permitted to remain by inadvertence; that no minimum prices are named, and that, by the written portion of the contract, appellant expressly agreed to sell his apples at pool prices. It is elementary that, if a contract is partly printed and partly written, a blank form being used, more attention will be paid to the written than to the printed portion if any conflict exists, the written portion being language expressly selected by the

parties to express their intention. The printed words "minimum price," which as we conclude were inadvertently left in the written contract, stand alone without any minimum prices being named. They cannot be construed to mean the same as the written words "advance prices," selected and used by the parties.

Considering the entire contract, and the stipulation introduced in evidence, we conclude that the judgment must be sustained. It is so ordered.

MORRIS, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 12015. Department Two. February 13, 1915.]

LODGE ROOM COMPANY, *Respondent*, v. PACIFIC BOND & INVESTMENT COMPANY, *Appellant*.[1]

LANDLORD AND TENANT—ALTERATIONS—LIABILITY OF TENANT. Liability for the construction of a fire escape in case of use of premises for assembly purposes, as required by city regulations, falls upon the tenant and not the landlord, where, by the terms of the lease, the premises were let for the special purpose of lodge and club rooms and offices, the lessee was given the premises rent free for at least one and possibly three weeks in order to make, without expense to the landlord, the necessary alterations for which a city permit was granted upon application of the lessee immediately after the lease was executed; and, while the lessor's consent was necessary, it was further provided that he should not be liable for alterations contracted for by the lessee; since the lessee was chargeable with knowledge of the police regulations governing the use of the building, and accepted the premises in their existing condition unfitted for the purpose for which they were leased.

Appeal from a judgment of the superior court for King county, Humphries, J., entered June 5, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

Chas. P. Harris, for appellant.

F. J. Carver and *John Slattery*, for respondent.

[1]Reported in 146 Pac. 376.

ELLIS, J.—Plaintiff is the lessee of the third floor of an office building in the city of Seattle, under a contract of lease entered into with the defendant on January 17, 1912, the term of the lease being from that date until November 10, 1915, at a monthly rental of $125. The provisions of the lease material to this action are as follows:

" . . . said rent shall commence on the first day of February, 1912; the period between the date of this lease and said seventh day of February, 1912, being allowed to the lessee without payment of rent, for the purpose of making alterations.

"That the lessee hereby covenants and agrees to keep said premises in good repair and to deliver up the same without notice at the expiration of this lease, in as good condition as reasonable use and wear thereof will permit, damage by the elements or fire excepted.

"That the lessee shall use said premises for the purpose of lodge and club rooms and offices and for no other purpose without the written consent of the lessor, and that the lessee shall not carry on or permit to be carried on, any business not in conformity with the laws of the United States and of the state of Washington and the charter, ordinances and requirements of the city of Seattle.

"That the lessor shall have the right to enter said premises at all reasonable times and to make any necessary repairs thereto, but this shall not be construed as an agreement on the part of the lessor to make any repairs whatsoever.

"That the lessee shall not make any alterations on said premises without the written consent of the lessor, and in no case shall the lessor be held liable for any work, labor or materials contracted for by the lessee or furnished at their request in or about said premises.

". . . that it is understood that the lessee is going to use said premises as lodge and club rooms and offices, and that it is understood that said lessee may sublet said premises to lodges, clubs, and for office purposes, and for entertainments in general, and for such purposes as lodge rooms and club rooms and offices are ordinarily used."

At the time the lease was entered into, the building was equipped with a ladder fire escape which would permit the use

of the third floor for almost any purpose except as a lodge or assembly room. The third floor of the building was twenty-seven feet above the street level. The ordinance of the city of Seattle touching the construction of assembly halls provides, among other things, that:

"Section 151 . . . No portion of the main floor of any assembly hall within the limits of the first and second building districts except in Class A buildings, shall be more than . . . twenty-five feet above said grade, if said hall shall accommodate less than five hundred persons." Seattle Ordinance, No. 17,240, § 151.

The grade referred to is the street grade at the main entrance. This building was not of Class A construction.

Immediately after the execution of the lease, the plaintiff entered into possession, and applied to the building department of the city of Seattle for a permit to make the necessary alterations and repairs to fit the third floor for lodge and club rooms. The permit was refused because the floor was two feet higher than the ordinance limit. It was, however, finally granted on condition that a stairway fire escape be constructed on the outside of the building before use for the purposes intended. The plaintiff thereupon notified the defendant of this requirement, but the parties could not agree as to who should erect the fire escape. In the early part of April, 1912, plaintiff caused the fire escape to be constructed and made the other alterations required to adapt the premises for lodge and club room purposes.

Plaintiff brought this action against defendant to recover the cost of constructing the fire escape, the loss incurred because of the delay of two months in the use of the premises, and also for an attorney's fee incurred in the negotiations with the city of Seattle. The lower court found in favor of the plaintiff and gave judgment against the defendant for $495. Defendant appeals.

The sole question presented is whether, under the terms of the lease and under the law, it was the duty of the appel-

lant to construct the stairway fire escape. The lease itself makes it plain that both parties contemplated that some alterations would be necessary to fit the premises for the proposed use, and that the respondent should pay for such alterations. The respondent, lessee, was allowed possession, rent free, for at least seven days, and if the date of the lease be controlling, possibly three weeks, for the purpose of making such alterations. It covenanted to make no alterations without the written consent of the appellant lessor, and that in no case should the appellant be liable for work, labor or materials furnished or used at respondent's request in or about the premises. While the lessor reserved the right to enter to make necessary repairs, there was an express stipulation that this should not be construed as an agreement on its part to make "any repairs whatsoever." A clearer acceptance by the respondent of the premises in their then condition with an assumption of the risk of any defect unfitting them for the purposes intended can hardly be conceived.

The case is distinctly ruled by two recent decisions of this court, *Rockwell v. Eiler's Music House*, 67 Wash. 478, 122 Pac. 12, 39 L. R. A. (N. S.) 894; and *McManamon v. Tobiason*, 75 Wash. 46, 134 Pac. 524. The first of these is analogous to the case in hand, save that the lease there in question contained no restriction as to the lawful uses to which the premises might be put by the tenant. This was held only one reason why the landlord's "failure to disclose" the fact that the premises could not be used, under the city ordinances, as a theater until an exit had been constructed was no actionable breach of the lease. The other reason which we there held sufficient to preclude a recovery by the tenant was that found here, namely, that the tenant was charged with knowledge of the provisions of the city ordinances, when he accepted the premises without exacting an express covenant that they should comply with the ordinances governing theater buildings. On this phase of the *Rockwell* case there can be no

possible distinction from the case here. As we said in that case:

"All persons who contract within the limits of a municipality in reference to matters which are governed by police regulations are charged with knowledge of their provisions."

In *McManamon v. Tobiason, supra,* provisions are quoted from the lease involved the same in every substantial particular as those found in the lease here. The premises were to be used solely for a hotel and such other business as is generally incident thereto. The tenant could make no alterations without the lessor's consent, and agreed to pay for any alterations made. We held that the lessor was not liable to the tenant for damages for failure to make certain alterations required by the hotel inspector, in the absence of an offer on the tenant's part to pay for such alterations. See, also, *Clarke v. Yukon Investment Co.*, 83 Wash. 485, 145 Pac. 624.

The case of *Hayton v. Seattle Brewing & Malting Co.*, 66 Wash. 248, 119 Pac. 739, 37 L. R. A. (N. S.) 432, which the respondent cites, is clearly distinguishable in that the adoption of the law prohibiting the sale of intoxicating liquors under local option took place subsequent to the making of the lease and could not have been in contemplation of the parties at the time the lease was made. Even in that case, however, it was held that the prohibition preventing the use of the building for the known purpose for which it was leased did not terminate the lease, for the reason that the lease contained no restriction of the use of the premises to saloon purposes. The case here is wholly different. As we have seen, the parties are presumed to have contracted with reference to the known provisions of the existing ordinances, and if the tenant did not intend to assume the duty of making the premises comply with such ordinances in order to meet the use for which it took the lease, it should have exacted a stipulation fixing that duty upon the lessor.

A review of the several decisions from other jurisdictions cited by respondent would be of no profit, since the case is

clearly governed by the two cases which we have cited and discussed. We are clear that the respondent, having undertaken to make the necessary alterations at its own expense, and having contracted with the full knowledge of the provisions of the city ordinances which is charged to every citizen, could not thereafter complain that the failure of the appellant to make the premises conform to those ordinances in order that they might be used for a lodge room was a breach of any of the terms of the lease, either express or implied.

The judgment is reversed, and the case is remanded for dismissal.

CROW, MOUNT, MAIN, and FULLERTON, JJ., concur.

[No. 12279. *En Banc.* February 13, 1915.]

LOS ANGELES BERRY GROWERS' CO-OPERATIVE ASSOCIATION, *Appellant*, v. FRED A. HUNTLEY *et al.*, *Respondents*.[1]

AGRICULTURE—INSPECTION—"HORTICULTURAL PRODUCTS"—INFECTED POTATOES. Potatoes are horticultural products within the contemplation of Rem. & Bal. Code, §§ 3095, 3096, authorizing the district horticultural inspectors of the state to inspect, require disinfection of, or destroy horticultural products packed for shipment, offered for sale, or held for the purpose of delivery upon any shipment or sale, where the same or any part thereof is infected with any disease or pest declared injurious by the state commissioner of horticulture.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—DUE PROCESS OF LAW. The horticultural inspection law, authorizing the state commissioner of horticulture to declare what pests are injurious to horticultural products, and to destroy infected products after notice, is not invalid as violating either the constitutional guaranty of due process of law, or the inhibition against the delegation of legislative power.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 23, 1914, upon findings in favor of the defendants, dismissing an action of trespass, tried to the court. Affirmed.

[1]Reported in 146 Pac. 373.

James Kiefer, for appellant.

The Attorney General and *John M. Wilson, Assistant*, for respondents.

PARKER, J.—The plaintiff seeks recovery of damages against the defendant for the loss of a quantity of potatoes which he, as state commissioner of horticulture, caused to be destroyed at Seattle, because of their infection with tuber moth. Trial in the superior court resulted in findings and judgment in favor of the defendant, from which the plaintiff has appealed.

It is conceded by counsel for appellant that the findings are sufficient as to the condition of the potatoes and the nature of the infection to sustain the judgment of the superior court, if there is any valid law applicable to the facts justifying the action of Huntley, as state commissioner of horticulture, in causing their destruction.

The contentions of counsel for appellant are, in substance, that the horticulture law of 1909 does not by its terms authorize the commissioner of horticulture, nor the district horticultural inspectors, to destroy potatoes because of their infection with disease; and, also, that the law of 1909 is unconstitutional in that it violates the "due process of law" guaranty of the state and Federal constitutions.

The powers of the district horticultural inspectors to cause the destruction of horticultural products because of their infection with disease such as menace the horticultural interests of the state are defined by the law of 1909, referring to the sections thereof found in Rem. & Bal. Code, as follows:

"§ 3095. Said district horticultural inspectors shall also have the power, within their respective districts and at any time, to enter upon any premises where fruit or horticultural products are stored, or are being prepared or packed for shipment, or offered for sale, or are held for the purpose of delivery upon any shipment or sale thereof, for the purpose of

inspecting said premises and such fruit or products to ascertain whether the same, or any part thereof, is infected with any of the diseases or pests declared injurious by the state commissioner of horticulture.

"§ 3096. If, after inspection, as provided in the two preceding sections, the district horticultural inspector shall ascertain that any nursery stock, fruit trees, shade trees, ornamental shrubbery or horticultural plants, or any fruit or horticultural products, or any place where such fruit or horticultural products is kept for sale or is being prepared for shipment or is stored is infected with any diseases or pests declared by the state commissioner of horticulture to be injurious to the horticultural industries of the state, said district horticultural inspector shall notify the owner or person having possession or charge of such nursery stock, fruit trees, shade trees, ornamental shrubbery, horticultural plants, fruit, horticultural products or places of storage, sale or preparation for market, in writing, requiring the disinfection of any or all thereof which is capable of disinfection, and the destruction of such as is incapable of proper disinfection, subject to the provisions hereof relative to the sale, disposition and use of infected fruit, and shall fix the time in said notice within which the same shall be so disinfected, or destroyed, as the case may be, and such owner or person having the same in charge shall proceed to disinfect or destroy such stock, trees or products, as the case may be, in the manner required by law and in the manner prescribed by the state commissioner of horticulture, and within the time specified in said notice."

The destruction of the potatoes was caused by direction of the state commissioner of horticulture, upon appeal from the decision to that effect rendered in the first instance by the district horticultural inspector for King county, which accounts for the state commissioner of horticulture being made defendant in this cause. We are of the opinion that the words "horticultural products" as used in these sections include potatoes, from which we think it necessarily follows, from the language of the sections, that the power here exercised by the commissioner was within the terms of the law.

The constitutionality of this law was considered by us in the late case of *Carstens v. DeSellem*, 82 Wash. 643, 144 Pac. 934, where substantially the same arguments were made against its validity as are made in this case. We deem it unnecessary to say more than that we adhere to the conclusions reached, and reasons assigned therefor, in that decision. The still more recent case of *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938, lends support to our conclusions. We again conclude that the law is constitutional, and that the judgment must be affirmed. It is so ordered.

All concur.

[No. 12480. Department One. February 13, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD ROWAN, *Appellant*.[1]

ROBBERY—INFORMATION—VALUE OF PROPERTY—NECESSITY OF ALLEGATION. The value of the goods taken is not an element of the crime of robbery, and hence need not be alleged, under Rem. & Bal. Code, § 2418, which provides that "robbery is the unlawful taking of personal property from the person of another, . . . by means of force or violence of fear of injury."

CRIMINAL LAW—HABITUAL CRIMINALS—INDICTMENT AND INFORMATION—SUFFICIENCY. An information charging the accused with being an habitual criminal, under Rem. & Bal. Code, § 2286, need not negative the fact that the previous convictions had not been annulled or set aside, as that is matter of defense; since the statute simply provides that persons previously twice convicted shall be habitual criminals, without reference to any annulment of the previous convictions.

SAME—EVIDENCE—PREVIOUS CONVICTIONS. In a prosecution of an habitual criminal, under an information charging him as twice previously convicted of a felony, it is not error to admit evidence of three previous convictions.

SAME—EVIDENCE—ADMISSIBILITY OF CERTIFIED RECORD. Upon a prosecution for being an habitual criminal, proof of an original conviction of robbery in another state by a certified copy of the record

[1]Reported in 146 Pac. 374.

thereof is expressly authorized by Rem. & Bal. Code, § 1254, relating to the proof of records and proceedings of any court of any of the states of the United States.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 20, 1914, upon a trial and conviction of robbery and of being an habitual criminal. Affirmed.

Welch & Dore, for appellant.

John F. Murphy and *S. H. Steele*, for respondent.

HOLCOMB, J.—Appeal from conviction of the crime of robbery, and further conviction of being an habitual criminal. The information charging robbery accuses the appellant and two others as follows:

"That they, said Joseph Driscoll, Edward Rowan and Joseph Conroy, and each of them in the county of King, state of Washington, on the 27th day of January, 1914, did then and there wilfully, unlawfully and feloniously, by means of force and violence to the person of one Ernest D. Sather, and by putting said Ernest D. Sather in fear of injury to his person, from the person and against the will of said Ernest D. Sather, one (1) watch, one (1) pocket knife, one (1) pair of gloves and one (1) fountain pencil, the property of said Ernest D. Sather, take, steal and carry away."

Upon a verdict of guilty, appellant moved for a new trial, which motion was denied. Thereafter a supplemental information was filed, charging him with being an habitual criminal, as follows:

"That the said Edward Rowan, on the 19th day of December, 1907, in the county of San Francisco and state of California, was then and there duly and legally convicted of the crime of grand larceny, the same being a felony at that time and at all times since under the laws of the state of California.

"That on the 17th day of November, 1909, in San Francisco county and state of California, the said Edward Rowan was then and there duly and legally convicted of the crime

of robbery, the same being a felony at that time and at all times since under the laws of the state of Washington.

"That on the 11th day of March, 1914, the said Edward Rowan, in the county of King and state of Washington, was then and there duly and legally convicted of the crime of robbery, the same being a felony."

Thereupon appellant was tried and convicted of all material facts stated in said supplemental information.

Appellant moved for a new trial under the supplemental information, and at the same time moved in arrest of judgment, attacking the validity of the original information for robbery; and also in arrest of judgment, attacking the validity of the supplemental information, all of which motions were denied.

(1) Appellant urges that it was error to overrule the motions for a new trial upon a conviction on the original information for robbery, because the information did not allege the value of the goods alleged to have been taken, or that they were of value. Under our statute, Rem. & Bal. Code, § 2418 (P. C. 135 § 331).

"Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of any one in his company at the time of the robbery."

It will be seen that the value of the goods is not an element of the crime of robbery under this statute. It is no doubt true that respondent could have framed an information charging the appellant with robbery which would have included larceny both grand and petit, by making the necessary allegation of the value of the property taken, but it was not necessary for the respondent to do so. It could omit the lesser offenses or degrees of the offense if it so desired. In this information the offense charged was simply robbery, and included none of the lesser offenses, unless it be that of petit larceny. It may be, though it is not necessary to decide here,

that the information for robbery as drawn included the lesser offense of petit larceny. In framing indictments or informations under the various statutes, it is not necessary to state the value of the property, unless the degree of the crime for which the accused may be indicted or convicted depends thereon. 18 Ency. Plead. & Prac., 1229. The value of the property is immaterial so it has some value. There is no occasion, as there is in larceny, for alleging the value, as the punishment is not made to depend upon the value of the property taken. 1 McClain, Criminal Law, § 472.

Appellant cites cases from this court: *State v. Johnson*, 19 Wash. 410, 53 Pac. 667; *State v. Morgan*, 31 Wash. 226, 71 Pac. 723; *State v. Dengel*, 24 Wash. 49, 63 Pac. 1104; *State v. Hatch*, 63 Wash. 617, 116 Pac. 286, where it was held that an information in the language of the statute, not alleging that the property taken by robbery was the property of another and not of the accused, was insufficient. Those cases are not in point here. It is well settled that charges of robbery must negative the idea that the property taken was the property of the accused. Further authorities on this question, to the effect that allegations of value are not necessary, are as follows: 1 Wharton, Criminal Evidence (3d ed.), § 126; *Williams v. State*, 10 Tex. App. 8; *State v. Perley*, 86 Me. 427, 30 Atl. 74, 41 Am. St. 564; *State v. Burke*, 73 N. C. 83; *Williams v. State*, 34 Tex. Cr. 523, 31 S. W. 405; *State v. La Chall*, 28 Utah 80, 77 Pac. 3.

(2) The motions in arrest of judgment, interposed to the conviction on the supplemental information were properly denied. Appellant cites *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *State v. Loehr*, 93 Mo. 103, 5 S. W. 696; and *Wood v. People*, 53 N. Y. 511. An examination of these cases discloses that such informations or indictments in those states would be required to follow the statute in each of those states, which, in Missouri, provides for conviction on repeated offenses of the same kind where "the accused had been

discharged on compliance with the sentence or pardoned;" and in New York, where the statute provided for subsequent conviction for repeated offenses, "where the accused had been convicted and a discharge of the person either upon being pardoned or upon the expiration of his sentence." There is no such provision in this state. The statute, Rem. & Bal. Code, § 2286 (P. C. 135 § 67), simply provides that every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall have previously been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, shall be punished as an habitual criminal by imprisonment in the state penitentiary for life. It is not necessary under this statute to negative the proposition that the previous convictions had not been annulled or set aside and had become final. In such case it would be incumbent upon the accused, if he could, to show by way of defense that the previous convictions had been annulled or set aside and had not become final. Nor was it error for the state to show in its main case in the trial on the supplemental information, that the appellant had not only been twice previously convicted of a felony, but had three times been so convicted. Neither was it error to prove the conviction on the original charge of robbery by a certified copy of the record thereof. The statute, Rem. & Bal. Code, § 1254 (P. C. 81 § 1133), expressly authorizes such proof.

There is no error shown in the record. Affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 12204. Department Two. February 16, 1915.]

In the Matter of the Estate of John W. Roberts.[1]

Descent and Distribution—Collateral Heirs—Children of Deceased Sister. Inheritance by collateral heirs is confined to "children," excluding grandchildren of collateral heirs of the deceased, under Rem. & Bal. Code, § 1341, subd. 3, providing that, where there is no issue, nor husband, wife, father nor mother, the estate of an intestate shall descend "in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation," in view of the fact that the word "children" in laws of descent is not construed to include "grandchildren," and the fact that this section distinguishes between "issue" and "children," authorizing inheritance *in infinitum* only by direct heirs; and this construction is not affected by Id., § 1328, providing for descent to "lineal descendants" in estates devised by will to collateral heirs.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered March 12, 1914, dismissing a petition for distribution to claimants of an interest in an estate, upon sustaining demurrers to the petition. Affirmed.

Howard O. Durk (*Herbert E. Snook* and *T. D. Rockwell*, of counsel), for appellants.

Raymond J. McMillan and *Ernest K. Murray*, for respondent Roberts.

Dunkleberger & Heinly, for respondent Rossiter.

Crow, J.—In May, 1912, John W. Roberts died intestate, leaving an estate in Pierce county, but leaving no issue, nor wife, nor father, nor mother. His brother, George W. Roberts, and his nieces, Catherine Rossiter and Elizabeth Beck, daughters of William Roberts, a deceased brother, are admitted to be his heirs at law. The surviving brother, George W. Roberts, was appointed and qualified as administrator of the estate. The appellants, Charles F. Larson, Ernest Larson, Edith Larson, and Nellie Wolbert, brothers

[1]Reported in 146 Pac. 398.

and sisters, are the surviving children of Alice Rossiter Larson, who was the daughter of a deceased sister of the intestate. When the estate was ready for distribution, appellants filed a petition, setting forth their relationship to the deceased and demanding that one-third of the estate be distributed to them. Demurrers of the conceded heirs at law interposed to this petition were sustained, and the petition was dismissed. This appeal is taken from the order of dismissal.

There is no dispute as to facts. The only question presented is whether appellants are entitled to inherit an interest in the estate. The third rule of our statute of descent, Rem. & Bal. Code, § 1341, subd. 3 (P. C. 409 § 637), which is applicable here, reads as follows:

"If there be no issue, nor husband nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation."

Appellants contend that, although the statute by express terms only includes children of deceased brothers and sisters among those entitled to a distributive share, it should be so construed as to include also grandchildren by right of representation. The trial judge distributed one-half of the estate to George W. Roberts, the surviving brother, and one-half to Catherine Rossiter and Elizabeth Beck, by right of representation as the children of William Roberts, a deceased brother of the intestate.

Appellants argue that our statute of descent, being in derogation of rules of the common law, should be strictly construed. They cite the fourth canon of descent at common law, 2 Blackstone, Commentaries, page *217, which reads as follows:

"That the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living."

They insist, that this canon of the common law was not repealed by our statute, § 1341; that it is still in force as an active and efficacious principle of our law of descent; and that it confers upon appellants a substantial right to inherit the same share of the estate which Alice Rossiter Larson, their mother, would inherit were she now living. Whether liberally or strictly construed, the statute conveys but one meaning, and that is that only children of deceased brothers and sisters of the intestate can inherit by right of representation. This conclusion is in harmony with the great weight of authority to which citation will be hereinafter made.

Appellants call attention to § 1328 of chapter 5, title 10, Rem. & Bal. Code, relating to wills, claim that it is *in pari materia* with § 1341, *supra*, of chapter 6 of the same title, and argue that the rule of inheritance *in infinitum*, mentioned in § 1328, should be adopted and applied in construing § 1341. The section cited (1328) reads as follows:

"When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, having lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator."

The section cited applies only to estates devised by will, and it is manifest the rule therein mentioned can have no controlling application to the estate of an intestate, the devolution of which is explicitly defined and limited by § 1341. The latter section, which is clear, explicit, and devoid of ambiguity, expressly provides for inheritance by *children* of deceased brothers and sisters of an intestate, but makes no provision for inheritance by *grandchildren* of such deceased brothers and sisters. In construing statutes of inheritance, the courts have not construed the term "children" as including grandchildren. Section 1341, in language which is plain and specific, provides that, in the event an intestate leaves no issue, nor husband nor wife, nor father and mother, nor either,

the estate shall descend in equal shares to the brothers and sisters of the deceased, and to the *children* of any deceased brother or sister by right of representation. Grandchildren are not mentioned, and provisions of the common or civil law relating to the same subject, if ever in force in this state, have been abrogated by this statute. The courts of many of the states have considered and passed upon the identical question here involved. In California a statute in force at the time our statute was adopted reads as follows:

"(3) If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation."

This section was construed by the supreme court of California in *Estate of William Curry*, 39 Cal. 529. In that case the intestate left a sister, a nephew, and a niece, the nephew and niece being respectively children of two sisters who died before the intestate. The intestate was also survived by four grandchildren of a deceased sister, who claimed they were entitled to a fourth interest in the estate. The trial court decided against them and, on appeal, the supreme court affirmed the judgment. In its opinion the supreme court said:

"There is no doubt that in the popular understanding the word 'children' does not include grandchildren, but is confined to the descendants in the first degree—the immediate offspring; and it may generally be said, too, that the construction put upon this word by law accords with its popular signification. In the judicial construction of wills, where rules of interpretation are often greatly relaxed, the word is considered as not including by mere expression the descendants in the second degree, in the absence of other phrases or of circumstances showing that the testator really used the word in a more comprehensive sense, in which case, of course, the ordinary meaning will be extended so as to support his ascertained intention. The statutory provision under consideration is one which regulates the distribution of property in the *collateral* descending line, and we think that the word 'children' should receive the construction which, as we

have said, comports with its usual legal and popular definition. Upon the point involved here, too, our statute seems to substantially conform to the English statute of Charles II, which was in turn borrowed from the 118th Novel of Justinian, and the general rule of both the novel and of the statute of Charles is, that among collaterals representation is not admitted after the immediate offspring of brothers and sisters."

This decision, which is directly in point, was made in 1870, before the legislature of the territory of Washington adopted our present statute of descent and distribution, and a comparison of our statute with that of California, which was construed in the case cited, indicates that our statute may have been taken from that of California. In the following cases similar statutes have been construed in the same manner: *Quinby v. Higgins*, 14 Me. 309; *Iglehart v. Holt*, 12 App. D. C. 68; *Bigelow v. Morong*, 103 Mass. 287; *Douglas v. Cameron*, 47 Neb. 358, 66 N. W. 430; *In re Chapoton's Estate*, 104 Mich. 11, 61 N. W. 892, 53 Am. St. 454. No cases have been cited by appellants which announce a contrary rule of construction.

The statute now under consideration uses the words "issue" and "children" as distinguished the one from the other. When descent to direct heirs of an intestate is directed, the word "issue" is used, authorizing inheritance *in infinitum*. In the instant case, the inheritance is not by direct but by collateral heirs, and it is especially notable that in dealing with collaterals § 1341, subd. 3, abandons the word "issue" and uses the word "children." Had it been the legislative intention that grandchildren of a deceased brother or sister of an intestate should inherit by right of representation, it would seem that the words "children" or "issue of children of a deceased brother or sister" would have been used in some manner similar to the use of the word "issue" in subd. 1 of the section. The words "child," "children," "issue," and "lineal descendants" are used with such careful discrimination in the various subdivisions of § 1341 as to make it evi-

dent that the legislature understood the meaning of each of them, and in each instance carefully selected the particular word or words best adapted to express its intention. In subd. 3, the word "children" is found in close proximity to the word "issue," indicating an understanding of the distinction in meaning between the two. The statute beyond question expresses an intention to limit the right of representation in cases where property descends to collateral heirs.

The trial court properly held that appellants are not entitled to any interest in the estate. The judgment is affirmed.

ELLIS, FULLERTON, MAIN, and MOUNT, JJ., concur.

[No. 11402. Department One. February 16, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. EDITH McCONAGHY, *Appellant*.[1]

ASSAULT AND BATTERY—SELF-DEFENSE—DUTY TO WITHDRAW. An aggressor in an affray cannot invoke the doctrine of self-defense unless she in good faith sought and endeavored to withdraw from and abandon the conflict.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. It is proper to refuse to instruct that it is not incumbent upon one assaulted upon her own premises to retreat before availing herself of the right of self-defense, where it appears that she was not assaulted upon her own premises; especially in view of other full and correct instructions touching her right of self-defense.

ASSAULT AND BATTERY—INSTRUCTIONS—DEGREES OF ASSAULT—EVIDENCE. Under Rem. & Bal. Code, §§ 2413, 2414, and 2415, defining assault in the first and second degrees as assaults with intent to kill, or to willfully inflict grevious bodily harm with a weapon likely to produce bodily harm, and in the third degree as an assault not amounting to the first and second degrees, upon a prosecution for first degree assault, an accused who admits that she shot at a person with intent to hit him, is not entitled to an instruction upon the subject of third degree assault, as there was no evidence to warrant it.

[1]Reported in 146 Pac. 396.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 16, 1914, upon a trial and conviction of assault in the second degree. Affirmed.

William R. Bell (*Homer E. Turner*, of counsel), for appellant.

John F. Murphy and *S. H. Steele*, for respondent.

PARKER, J.—The defendant, Edith McConaghy, was charged by information in the superior court for King county with the crime of assault in the first degree, in that she assaulted J. E. Matlack with a revolver and shot him with intent to kill him. The trial resulted in a verdict of guilty of assault in the second degree against her, upon which the court adjudged that she be fined in the sum of $700 and costs, and stand committed to the county jail until both fine and costs are paid. From this judgment, she has appealed.

For some time prior to this quarrel, there had been differences and quarrels between Matlack and appellant's husband, in which she apparently participated in some degree. Matlack and his wife lived but a short distance from the McConaghy's, their dwellings being approximately one hundred feet apart. Matlack's house is but a few feet from an alley, which is sixteen feet wide. Directly opposite Matlack's house and adjoining the alley is a barn used by Matlack in which he keeps his horses. Approximately between Matlack's house and the barn is where this quarrel and shooting occurred. If any of it occurred off the alley, it was upon or very near Matlack's premises. None of it occurred on appellant's premises nor within some considerable distance thereof.

During the afternoon just prior to the affray, McConaghy, returning home, went directly into the alley between Matlack's house and the barn, where an altercation commenced between them about a dog fight which had evidently occurred near there during the day, McConaghy accusing Matlack

with encouraging the dogs to fight. McConaghy's interest in the dog fight was evidently because of his ownership of one of the dogs. This altercation consisted only of words, and possibly of some threats on the part of Matlack, and was heard by appellant who was then in her own house. She then took and concealed under her apron, or in her apron pocket, a revolver and went to her husband's defense, as she claims, when the altercation shifted and became one between her and Matlack. There is evidence tending to show violent and threatening language used by each towards the other, as well as overt acts of each towards the other indicating an intended assault. As to who was the aggressor, however, we are quite clear, in the light of the evidence, was a question for the jury to decide. The affray ended by the appellant shooting Matlack, the bullet entering his groin and passing nearly through his body just over the pelvic organs. Appellant seeks to justify the shooting on the ground of self-defense.

It is contended by counsel for appellant that the evidence is not sufficient to justify the verdict and judgment. We have carefully reviewed the evidence as found in the record and conclude it is ample to support the jury's conclusion that appellant is guilty of assault in the second degree. We deem it unnecessary to analyze the evidence in detail here. Indeed, we are unable to see how we could disturb the verdict upon this ground had it been for assault in the first degree, in view of the evidence tending to show appellant's intent. The jury evidently concluded, however, that appellant shot Matlack only with intent to inflict bodily harm upon him and not with intent to kill him.

It is further contended in appellant's behalf that the trial court erred in giving the jury the following instruction:

"An accused person who is an aggressor in an affray, or by acts or words provokes or brings on an affray, cannot invoke the doctrine of self-defense or be justified in shooting to prevent injury, unless before such shooting, such ag-

gressor in good faith sought and endeavored to withdraw from and abandon the conflict."

Counsel do not seriously contend that this is an erroneous statement of the law, but that there is no evidence sufficient to warrant the jury in concluding that appellant was the assailant, and that, therefore, the giving of the instruction was error prejudicial to appellant. We think it clear, however, that there was ample evidence to warrant the jury in concluding that appellant was the aggressor in the affray. That this instruction constitutes a fair statement of the law seems clear from the authorities: 21 Cyc. 805, 811; 1 Bishop, New Criminal Law, §§ 844, 847 and 870; *Beard v. United States*, 158 U. S. 550. In this connection counsel for appellant requested the court to give the jury the following instruction:

"It is not incumbent upon one assaulted upon her own premises to retreat or consider whether a retreat can be safely made before availing herself of the right of self-defense, where she has reasonable grounds to believe and does in good faith believe that her assailant intends to take her life or do her great bodily harm."

The refusal to give this instruction is also claimed to be error; but it is plain that this instruction had no application to the case because it is undisputed that neither the appellant nor her husband were upon their own premises at the time of the affray. Indeed, they were at some considerable distance therefrom in the alley between Matlack's house and the barn where he keeps his horses and within a very few feet from Matlack's premises. Counsel's theory seems to be that the above quoted instruction which was given by the court to the jury is only applicable to the prosecution's theory of the facts in setting a limit to appellant's right to stand her ground and not endeavor to withdraw, and that having given that instruction the court should, in any event, have given to the jury an instruction upon the same subject in terms applicable to appellant's claim of her right to stand her

ground and not endeavor to withdraw; so that the jury would have before it not only the law as it restricted her right of self-defense in that regard, but also the law applicable to the facts entitling her to stand her ground and not withdraw.

It is difficult for us to see that appellant's requests for instructions were such as to entitle her to now complain upon this ground; but however that may be, while the above quoted instruction given by the court is applicable to the state's theory that the appellant was the aggressor, it also must have conveyed to the minds of the jury the thought that she was not required to withdraw unless she was in fact the aggressor; especially in the light of other instructions given by the court to the jury touching her right of self-defense. These instructions were full and very favorable to the appellant touching her right to defend both herself and her husband; her right to act upon reasonable apprehension of danger to either, whether the danger be real or only apparent; and her right to resist to such extent as seemed to her at the time reasonably necessary to the protection of herself and husband against any threatened assault on the part of Matlack.

It is further contended by counsel for appellant that the trial court erred in refusing to give requested instructions submitting to the jury the question of appellant's guilt of assault in the third degree. Referring to Rem. & Bal. Code, §§ 2413, 2414, and 2415 (P. C. 135 §§ 321, 323, 325), we find that to constitute assault in the first degree it must be committed "with intent to kill a human being, or to commit a felony," and that to constitute assault in the second degree the assailant must "willfully inflict grievous bodily harm upon another with or without a weapon," or "willfully assault another with a weapon or other instrument or thing likely to produce bodily harm," in so far as such elements of assault in the first or second degrees have any application to the facts of this case; and that assaults in the third de-

gree are such as do not amount to assault in either the first or the second degrees. Appellant, by her own testimony, clearly admits that she shot at Matlack with intent to hit and injure him. She was questioned, and answered upon cross-examination as follows:

"Q. When you fired that shot at Matlack where did you aim to hit him? A. I did not have no particular place to hit him because I aimed to stop him. Q. You just fired to hit him? A. Yes, sir."

This, it seems to us, precludes the possibility of appellant being guilty of any other offense than that of assault in either the first or second degree. As to which of these she was guilty of, it seems plain was determinable by her intent. Assuming that she was not justified in the shooting, as the jury found, if she intended to kill Matlack she would be guilty of assault in the first degree, while if her intent was only to inflict upon him bodily injury by shooting him, a revolver being an instrument likely to produce bodily harm, she would be guilty of assault in the second degree. We see no room for argument that any other verdict than one of these two, or a verdict of not guilty, could be rendered against appellant. This conclusion finds support in our decisions in *State v. McPhail*, 39 Wash. 199, 81 Pac. 683; *State v. Kruger*, 60 Wash. 542, 111 Pac. 769; and *State v. Harsted*, 66 Wash. 158, 119 Pac. 24.

Other claims of error we think are without merit and do not call for discussion. The judgment is affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12005. *En Banc.* February 17, 1915.]

J. W. MERRITT *et al.*, *Respondents*, v. ALLEN MEISENHEIMER, *Appellant*.[1]

ACCOUNT STATED—PLEADING—COMPLAINT. A plaintiff who elects to base his action upon an account stated must allege that the account was in fact agreed to, and it is not sufficient to allege merely collateral facts from which the ultimate fact may or may not follow.

APPEAL AND ERROR—REVIEW—AMENDMENT OF PLEADINGS. The rule that the sufficiency of a complaint, curable by amendment, will not be inquired into on appeal is inapplicable where the trial court granted judgment on the pleadings on the ground that the answer presented no issue, when the basic error was that the complaint itself set forth no issuable fact.

ACCOUNT STATED — RENDITION OF ACCOUNT — ASSENT — PRESUMPTIONS—BURDEN OF PROOF. The mere rendition of an account by one party to another, although time may elapse without objection interposed, will not make it an account stated, when there is no other element of agreement thereto than merely the lapse of time, and no circumstances creating an estoppel; since reception of the account without objection operated only to shift the burden of proof to the debtor, and any presumption of assent on his part is rebuttable.

SAME—ESTOPPEL TO DISPUTE. Failure to dispute an account rendered during a period of nearly one year after the reception of the first statement would not work an estoppel, where the parties gave up nothing nor changed their legal position in any way by rendering their account.

SAME — FAILURE TO OBJECT — REASONABLE TIME — QUESTION FOR JURY. The trial court is not warranted in discharging the jury and holding that an account rendered is an account stated as a matter of law, because the debtor did not object within what the court deemed a reasonable time; but the presumption arising against the debtor from lapse of time must be measured with reference to the business capacity of the parties, their relative situation, dealings, intelligence, and all other circumstances; thus presenting a question for the jury as to whether such time elapsed, without excuse for delay, as to raise a presumption of assent constituting a binding promise to pay the account as stated.

SAME—OPPORTUNITY TO CHALLENGE ACCOUNT—EFFECT. The fact that the debtor and his creditors frequently met at lunch and in lodge meetings without the subject of the account rendered being broached

[1]Reported in 146 Pac. 370.

by the debtor would not be sufficient to establish his assent thereto, but would be no more than one circumstance to be considered in arriving at a conclusion.

MOUNT, J., dissents.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered February 21, 1914, in favor of the plaintiffs upon the pleadings, after withdrawing the case from the jury, in an action upon an account. Reversed.

Zent, Powell & Redfield, for appellant.

Graves, Kizer & Graves and *Merritt, Oswald & Merritt*, for respondents.

CHADWICK, J.—This purports to be an action upon a stated account. The plaintiffs are copartners engaged in the practice of law at the city of Spokane, and the defendant is a resident of Spokane county. The complaint avers that, prior to the first day of December, 1912, the defendant became indebted to the plaintiffs for services performed and moneys paid out and expended in his behalf; that an open running account was kept between the plaintiffs and the defendant; that on the date last mentioned, the plaintiffs prepared and mailed to the defendant a full and complete itemized statement of such account; that this statement was received by the defendant in due course of mail; that a like statement was mailed to the defendant on the first day of August, 1913, and again on the first day of October, 1913, copies of which several statements are attached to the complaint as exhibits; that from the time of the receipt of such statements, the defendant made no objection thereto, but acquiesced therein until payment was demanded on the 18th day of November, 1913, when the defendant objected to the amount claimed and refused to pay the same. A demurrer was interposed to the complaint, but the demurrer was overruled, and an exception allowed. The defendant then answered over. The original answer was superseded by an

amended answer during the trial, to which brief reference will be made in the course of the opinion. The case came on for trial before a jury. The plaintiffs offered evidence tending to show the rendition of the account as alleged and the failure of the defendant to object thereto, although the several plaintiffs had repeatedly met and conversed with the defendant since the rendition of the account. At the close of the plaintiffs' testimony, the defendant challenged its legal sufficiency and moved for a judgment in his favor. It was then agreed that the entire law applicable to the case should be discussed by counsel and settled by the court before further proceeding. At the close of the argument, the court ruled, in substance, that the account rendered by the plaintiffs became an account stated by reason of the failure of the defendant to object thereto within a reasonable time; that such an account could only be impeached for fraud or mistake, and that the original answer was insufficient to raise either of these defenses. An amended answer was thereupon filed by leave of court, which denied that the defendant agreed to the statement as rendered or acquiesced therein, set forth twenty-two errors in the account, and interposed affirmative defenses to several of the principal items. The plaintiffs confessed a number of the errors thus pointed out in the answer, and the court again ruled that the amended answer was insufficient to impeach the correctness of the account in other respects. Whereupon the jury was discharged and a judgment rendered against the defendant for the full amount claimed, less the several items confessed by the plaintiffs. From this judgment, the defendant has appealed.

The judgment of the court below is erroneous for two reasons; first, because the complaint does not state facts sufficient to constitute a cause of action, and, second, because the amended answer sufficiently challenged the correctness of numerous items in the account.

An account stated is an agreed balance of accounts, whether that agreement be expressed or implied, and the

party who elects to base his action on an account stated must allege that the account was in fact stated or agreed to. He may not limit himself to a mere statement of collateral facts from which the ultimate fact may or may not follow. As said by the court in *Emery v. Pease*, 20 N. Y. 62,

"The pleader has set forth some matters of evidence having perhaps a slight tendency to prove that the account had been taken and the balance due to the plaintiff ascertained by the parties according to the principles of the agreement between them. But he seems carefully to have avoided the very conclusion of fact which alone would justify a suit for the recovery of an ascertained and admitted balance, to wit, that the parties had stated the account and that the statement thus made showed there was due to the plaintiff the sum which he claimed to recover. The averment that the plaintiff had made a statement and delivered it to the defendant who made no objections to it, does not necessarily establish the required conclusion even if it has a tendency in that direction; and consequently we cannot hold that the fact of an account stated between these parties has been pleaded in any manner or form. We are required, and we are always inclined to give a liberal and benign construction to pleadings, under the present system; but if a party either ignorantly or wilfully will omit the very fact on which his case depends, and will content himself with averring evidence inconclusive in its nature, he must take the consequences of his error if objection be made at the proper time."

See, also, *St. Louis, L. B. B. Co. v. Colorado Nat. Bank*, 8 Colo. 70; *McKenzie v. Poorman Silver Mines of Colorado*, 88 Fed. 111.

Ordinarily we would not inquire into the sufficiency of a complaint after trial where the defect is curable by amendment, but when the court grants a judgment on the pleadings because the answer presents no issue upon a complaint which itself sets forth no issuable fact, the error becomes at once apparent. Furthermore, the answer denied that the defendant agreed to the statement or acquiesced therein, and the complaint charged little beyond this. *McKenzie v. Poorman Silver Mines of Colorado, supra.*

We also think the correctness of several items of the account was sufficiently challenged by the answer. The court below seems to have been of opinion that it was incumbent on the defendant to show fraud or mistake in the settlement or statement of the account, and that it was not sufficient to charge fraud or mistake in the account itself. Such, however, is not the rule. Indeed how could fraud or mistake be shown in the settlement or statement of an account when the parties never met together or discussed the matter in hand? The only effect of the failure of a party to interpose objection to an account rendered is to shift the burden of proof. The mere rendition of a bill for services, although time may elapse, will not in itself make an account an account stated.

"The mere rendition of an account by one party to another does not show an account stated. There must be some form of assent to the account, that is, a definite acknowledgment of an indebtedness in a certain sum." *Shaw v. Lobe*, 58 Wash. 219, 108 Pac. 450, 29 L. R. A. (N. S.) 333.

An account rendered and unobjected to is *prima facie* evidence of the correctness of the account, and if not overcome by other circumstances excusing the omission of the debtor, it may be an account stated.

"The presumption of conclusiveness which attaches to an account stated is one of evidence, and the extent of the application of the foregoing principles cannot be resolved into the statement of an unalterable rule which will cover all cases. Thus mere acquiescence after the rendition of an account may be sufficient to bind one as upon an account stated, and while this species of proof is said to be far from conclusive, though sufficient in the absence of contradictory evidence, yet the question is one merely of evidence, and at most an express admission is but stronger proof of correctness requiring stronger proof of mistake, and payment of the balance ascertained is but stronger proof than these requiring perhaps still stronger proof in rebuttal. In neither case, however, would the parties be precluded from giving evidence to impeach the account in the absence of an intervening estoppel or obligatory agreement, the force of the admission

and the strength of the evidence necessary to overcome it always depending upon the circumstances of each case." 1 Cyc. 456.

"In regard to acquiescence in stated accounts, although it amounts to an admission or presumption of their correctness, it by no means establishes the fact of their having been settled, even though the acquiescence has been for a considerable time. There must be other ingredients in the case to justify the conclusion of a settlement." 1 Story, Equity Jurisprudence (13th ed.), § 528.

See, also, 1 Corpus Juris 692; 1 Cyc. 456; Abbott, Trial Evidence, p. 568; Wharton, Law of Evidence, § 1140; Jones, Evidence, § 287; *Shaw v. Lobe*, 29 L. R. A. (N. S.) p. 348, note. We shall not attempt to assemble or review the authorities. They are "Thick as autumnal leaves . . . in Vallombrosa."

A failure to object to an account rendered does not admit the correctness of the account so as to make it a binding unimpeachable obligation. There may be cases which hold that this is so, but, by better authority—we may say that it is almost universally so held—in the absence of circumstances which would create an estoppel, the reception of the account raises no more than a presumption of assent on the part of the debtor, which may be rebutted. The statement of the law as it is expressed in Abbott's Trial Evidence was indorsed by this court in the case of *Baxter v. Waite*, 2 Wash. Terr. 228, 6 Pac. 429. In that case, the court instructed the jury that the defendants were estopped by their mere silence from denying the correctness of all items in the account, regardless of the effect such silence may have had on the plaintiffs. The court said:

"Mr. Abbott, in his work on Trial Evidence, p. 458, Sec. 1, says: 'An account stated is not now regarded as a contract upon a new consideration, and does not create an estoppel, but it establishes *prima facie* the accuracy of the items without further proof. The statement is not the equivalent of an express promise to pay the balance, when the items do not constitute a legal debt or duty.'

"It is believed that this is a correct statement of the law, applied to an account which has become a stated account by the silence of the party to whom it was rendered, however it may be as to an account which has been balanced with the express assent of both parties. Silence as to an open account rendered does not and ought not to extend liability in such an account beyond what is justly due. To hold otherwise would be to eliminate from the contract sued on, one of the essentials of all contracts, namely, the existence of a good consideration. The law imposes a penalty for the silence, however, which is that the burden of proof is shifted from the party whose interest it is to establish the account, and the account will stand in its entirety unless the other party, by affirmative proof, can impeach it. The penalty is not the creation by the law of an entirely new contract between the parties, but the shifting from one party to the other of the burden of proof. . . .

"To create an estoppel in favor of a stated account, several things must concur besides knowledge at the time the account was rendered on the part of the person defending, of the truth of the matters which he is trying to set up; the most important being want of knowledge of the truth on the part of the person claiming the estoppel, and action on his part to his prejudice induced by the silence of the other party."

A leading case is that of *Lockwood v. Thorn*, 18 N. Y. 285, where the court, in discussing the effect of an account rendered and unobjected to, said:

"But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within the principles of an *estoppel in pais*, or an obligatory agreement between the parties; as, for instance where, upon a settlement, mutual compromises are made."

This court has defined an estoppel on more than one occasion. There can be no estoppel unless there is a direct benefit on the one hand or an injury on the other. *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137. In the case at bar, there was no interchange of goods or services between the parties, neither had there been any negotiations tending toward a

settlement. Respondents gave up nothing by rendering their account. Their legal position was in no way changed. They might have brought suit on the day following. There are no circumstances suggested in the pleadings or sustained by the proofs which would warrant a court in saying that the account had ripened into an obligation which could not be disputed or denied, except the lapse of time. This brings us to the controlling question in the case. Admitting that an account rendered may ripen into an account stated from the mere lapse of time, if the transaction be between merchants or those having mutual accounts, although it is generaliy conceded that the rule cannot be strictly applied between others, we are brought to what seems to us to be the controlling question in the case, that is, whether the trial judge can hold such an account to be an account stated as a matter of law, or whether the defendant is entitled to have the verdict of a jury. The court below seems to have turned its judgment on the proposition that the account had become an account stated because appellant did not object within what he conceived to be a reasonable time. He discharged the jury and entered judgment.

In the following jurisdictions it has been held that what is a reasonable time is a question of law for the court, or, if the facts are not clear, a mixed question of law and fact: United States, Florida, Missouri, and Oregon. It is a question for the jury in Pennsylvania, Massachusetts, Iowa, Michigan, Illinois, New Hampshire, and Kansas. See 1 Ency. Evidence, 174, and supplements. In New York it has been held both ways. Under the constitution of this state, a jury, when called, is made the trier of the facts, and it is only where a court can say that there is no issue of fact or, from a consideration of all the facts or circumstances, the minds of reasonable men would not differ, that the court will enter a judgment over the heads of the jury.

A court cannot, from the very nature of things, pass on the question of time without measuring it with all the attend-

ant facts and circumstances, for what is a reasonable time is a relative question. Although it was held in the case of *Ault v. Interstate Savings & Loan Assn.*, 15 Wash. 627, 47 Pac. 13, that what is a reasonable time is a question of law if the facts are undisputed, or a mixed question of law and fact if they are disputed; nevertheless the court did not decide that the account had been held for a time that was not unreasonable from the slight circumstance of lapsing time, but did inquire into and measure that time by many facts which the jury had passed upon, and found "from all the proof" that it did not appear "that the account was consented to by the defendant." The case declares one rule and applies another, and is inconsistent with *Baxter v. Waite* and *Shaw v. Lobe, supra.*

In the case at bar, as in all cases, the presumption arising from the lapse of time must be measured with reference to the business capacity of the parties to the action; their relative and local situation; their customary dealings; their business methods; their intelligence or want of intelligence, and all other circumstances attending them in their dealings and in the rendition of the account. See *Shaw v. Lobe*, 29 L. R. A. (N. S.) 349; *Martyn v. Arnold & Co.*, 36 Fla. 446, 18 South. 791.

It is conceded by all of the better text writers and in the better considered cases that no hard and fast rule can be laid down by the court in cases of this kind, and although it is held in some states that what is a reasonable time is a question of law for the court, and in others that it is a question of fact for the jury, we think the rule may be illustrated in the case of *Martyn v. Arnold & Co.*, which is a fair type of its class. It is there said:

"What is a reasonable time within which the person to whom an account is rendered must object or become bound depends upon the relations of the parties and the usual course of business between them. Whether the question of what is a reasonable time within which to make such objections is one of law for the court, or of fact for the jury, the

authorities are in conflict, but it has been settled here that the question of what is a reasonable time is one *of law for the court* to determine in every case, dependent, however, upon the *facts* proved, the latter to be passed upon by the jury. *Gordon v. Estate of Simonton*, 10 Fla. 179; *Bacon v. Green*, 36 Fla. 313, 18 South. 866. In such cases, therefore, it is always proper for the court to instruct the jury as to the law upon the several hypotheses of facts in the premises insisted upon by the parties."

The error in this reasoning, in so far as our law and practice is concerned, lies in this: the jury is told to find certain facts and the court draws therefrom a conclusion. The conclusion is just as much a fact as any other fact in the case. It is the final and controlling fact. Indeed, the court cannot so hold, as a matter of law, without passing upon every other fact and circumstance in the case. It is the law in this state in other cases, and should be in all cases, that the jury shall take account of all the facts in the case and draw its own conclusions. As compared with one set of circumstances, a year may seem to be an unreasonable time. When measured by another set of circumstances, the lapse of time may have no controlling weight at all. It is only where there is an absence of all circumstances except the lapse of time that the court may draw a legal conclusion. Where there are other circumstances, the legal conclusion is not whether a sufficient time has elapsed to create an unimpeachable contract to pay, as upon an account stated, but whether the jury having found that an unreasonable time has elapsed and the circumstances are not sufficient to excuse the delay, the presumption of assent is so strong as to preclude a contrary conclusion. Or in other words, so strong as to make a binding promise.

But it is said that defendant had opportunity to object; that he frequently met one or more of the plaintiffs at lunch time; that they had lunch together and that they also met at lodge meetings. This is but one circumstance to be considered. But if it were all, we would not be inclined to hold,

as a matter of law, that men who are accustomed to meet at a lodge or take lunch together at a club are in duty bound to challenge an account rendered, at such times and at such places, and that if they do not they are forever concluded to thereafter question it. If it were incumbent upon defendant to speak at such times and places, by the same token it was the duty of plaintiffs to remind defendant of the fact that an account had been rendered and had not been paid. It cannot be put forth as an abstract statement of law that men who have mutual dealings and who meet in social and fraternal intercourse are bound to speak under the pain of suffering the penalty of estoppel. We cannot say that there is a legal duty to carry the burdens and distractions of business into the hours of relaxation and refreshment. A man cannot be held to a rule that would hazard his digestion by a self-reminder of his debts and business troubles. There is a place for work and a place for play.

We have said that the complaint does not state a cause of action. If respondents do not care to treat the action as one upon *quantum meruit*, they may amend and try out the issue of account stated.

Reversed and remanded for a new trial.

MORRIS, C. J., PARKER, CROW, MAIN, and ELLIS, JJ., concur.

MOUNT, J. (dissenting)—It seems to me that where repeated statements of an account have been sent to and received by a debtor and no objection made thereto for eleven months, as in this case, the account will be deemed agreed to and become stated in fact and in law. I therefore dissent.

[No. 12012. Department Two. February 18, 1915.]

ELIZABETH L. COLBY *et al.*, *Appellants*, v. FLORA KEENE *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—CONTRACTS—CONSTRUCTION—DEED IN ESCROW—COVENANTS—EFFECT. An informal contract for the sale of land, calling for an abstract of title, showing title unincumbered, does not modify or control the construction of the subsequent formal contract of sale providing that a warranty deed therefor should be placed in escrow and that the grantee shall pay all assessments levied in the year 1910; and the vendee is not entitled to take advantage of the covenants of warranty of the deed in escrow before delivery and full performance of the contract terms as to payment of the purchase price, although compelled to pay assessments on the property levied in 1910, which constituted a lien prior to the contract of sale.

SAME—COVENANTS AGAINST INCUMBRANCES—TAXES AND ASSESSMENTS—SPECIAL COVENANTS AS TO PAYMENT. Under a contract of sale providing that the real estate is free and clear of all incumbrances, but specially stipulating that the vendee shall pay all taxes and assessments for the year 1910, the vendee is liable for the assessments of that year, although a lien at the date of contract, under the rule that, where there is a general covenant in a deed or contract against incumbrances, and a special covenant not in harmony therewith, the special covenant will prevail.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 8, 1913, dismissing an action for specific performance, tried to the court. Affirmed.

Merritt, Oswald & Merritt, for appellants.

George W. Sommer and *E. Ben Johnson*, for respondents.

MAIN, J.—On March 31, 1910, the defendants, Flora Keene and J. L. Keene, sold to the plaintiffs lot 16, in block 13, in Pine Grove Terrace addition to Spokane, Washington. On this day $5 was paid as earnest money, and a receipt given therefor signed by Flora Keene, one of the defendants. This receipt, among other things, provided that the "Owner

[1]Reported in 146 Pac. 395.

to furnish abstract showing good title unincumbered." On April 4, 1910, a formal written contract was signed by the parties and duly acknowledged. The purchase price of the property was $950, $200 of which, including the $5 earnest money, was paid upon the execution of the contract; the balance of the purchase money was to be paid in monthly installments of $10 each. The contract of April 4 contained this provision:

"It is further stipulated, agreed and warranted, that said real estate shall be and is free and clear of all incumbrances and liens of every kind and character, and that the parties of the second part (plaintiffs) shall have the right to the immediate possession, use and occupancy thereof, and that said parties of the second part shall pay the taxes and assessments levied against said property for the year 1910, and all taxes and assessments which may be subsequently levied against said real estate."

The contract also contained a provision for a "good and sufficient deed of conveyance with full covenants of warranty," which should convey the property free and clear of all incumbrances. On April 4 there was also executed by the Keenes a general warranty deed conveying the property to the plaintiffs. Thereafter the formal contract of April 4, and the warranty deed, by agreement of the parties, were delivered to the Washington Trust Company to be held in escrow until the full amount of the purchase price should be paid; and in event of the failure of the plaintiffs to pay to the trust company the installments specified in the contract, the papers were to be returned to Flora Keene.

On May 1, 1913, the plaintiffs tendered to the Washington Trust Company the sum which they claimed to be the balance due upon the contract, and demanded the delivery of the deed held in escrow. This demand was not complied with. It appears that there was a lien against the property covered by the contract on account of special assessments. This lien was created during the month of January, 1910. The question arose between the parties as to who should

pay this local assessment. The present action was instituted for the purpose of determining that question.

The cause was tried to the court without a jury, and resulted in a judgment that the assessment lien should be paid by the purchasers. From this judgment, the plaintiffs appeal.

The appellants contend that the contract of April 4, when the provisions from it above quoted or referred to are read in the light of the previous earnest money receipt, and the warranty deed delivered in escrow, shows that it was the intention of the parties that the local assessment should be paid by the vendors. The respondents claim that the contract of April 4 requires the purchasers to pay the assessment in question, and that this contract is not modified, either by the previous earnest money receipt, or by the delivery of the warranty deed in escrow. The provision in the earnest money receipt called for an abstract showing title unincumbered. This receipt was executed only by Mrs. Keene. It seems reasonably plain that the general terms in this informal document would not modify the subsequent formal contract executed by the parties. The warranty deed had never been delivered to the purchasers, but had only been delivered to the Washington Trust Company in escrow to be subsequently delivered to the purchasers upon the performance of certain conditions. It follows, therefore, that the terms of this deed were not available to the plaintiffs, whatever their rights would have been thereunder had it been delivered to them.

Coming to the contract of April 4, it appears that in that contract there were general provisions calling for the execution of a warranty deed conveying the property free and clear of all incumbrances, and that the property was free and clear of such incumbrances; and also a special provision that the purchasers shall pay the taxes and assessments levied against the property for the year 1910. It is conceded by the appellants that, if there were no other provision in the contract with reference to the incumbrances other than the

special one relative to the taxes and assessments for the year 1910, the ruling of the trial court would be correct. But it is contended that this special provision is overcome by the other provisions of the contract. The rule appears to be that, where there is a general covenant in a deed or contract against incumbrances, and a special covenant or term which is not in harmony with the general provision, the special covenant will prevail. In *Geer v. Redman*, 92 Mo. 375, the defendant, by warranty deed with general covenants against incumbrances, conveyed property to the plaintiff. To secure a part of the purchase money, the plaintiff executed and delivered a deed of trust which in express terms covenanted to pay all taxes then existing against the land. The question arose as to which of the parties should pay the taxes upon the property acquired by the plaintiff which existed against the land at the time the conveyances were made. It was there held that the special covenant in the trust deed would prevail. It was said:

"The deed sued upon and the deed of trust were made upon the same day, delivered at the same time, conveyed the same land, and were different parts of one and the same transaction, and may be taken and read together. The general covenant in the deed was qualified by the special covenant in the deed of trust, and the two instruments show that plaintiff was to pay the taxes for which he sues."

In *Schaad v. Robinson*, 59 Wash. 346, 109 Pac. 1072, the court construed the terms and covenants of a deed where, immediately after the description, a clause was inserted: "Clear of all incumbrances, except a mortgage of two thousand fifty ($2,050) dollars." In the habendum clause of the deed there were general covenants "that the said real estate is free from all incumbrances." It was held that the language following the description which excepted the mortgage would qualify the general covenant against incumbrances. It was said:

"All parts of the deed must be considered. The property therein described is by explicit statement conveyed subject

to the mortgage. When a grantor expressly states in an instrument of conveyance that it is subject to a certain specific lien, and then covenants that the real estate conveyed is free from incumbrances, and that he will warrant and defend against all lawful claims and demands of all persons, the prior recital of the lien qualifies the subsequent covenants and prevents their application to such incumbrance."

The judgment will be affirmed.

CROW, FULLERTON, MOUNT, and ELLIS, JJ., concur.

[No. 12058. Department Two. February 18, 1915.]

C. M. KINGSLEY, *Respondent*, v. STANDARD LUMBER COMPANY, *Appellant*, JESSE YOUMAN, *Defendant*.[1]

BAILMENT—LIABILITY OF BAILEE—NEGLIGENCE. Upon a bailment of a team of horses for hire, with a driver furnished by the owner, whom the bailee put at other work, the bailee is liable for negligence of his own driver in the handling of the horses.

BAILMENT—NEGLIGENCE—BURDEN OF PROOF—PRESUMPTIONS. Evidence that horses, hired to a bailee, were in good condition at the time of the bailment, and that one was returned in bad condition and the other not at all, raises a presumption of negligence on the part of the bailee, and shifts the burden of proof, in an action by the owner to recover damages.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 26, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for appellant.

George M. Nethercutt, for respondent.

MAIN, J.—The purpose of this action was to recover damages for injuries to a team of horses, alleged to have been

[1]Reported in 146 Pac. 369.

due to using them in a negligent manner. The cause was tried to the court and a jury. A verdict in the plaintiff's favor in the sum of $248.75 was returned by the jury. Upon this verdict, a judgment was entered. At appropriate times, a challenge to the sufficiency of the evidence was interposed, and motions for judgment notwithstanding the verdict and for a new trial were made, all of which were denied. The Standard Lumber Company has appealed.

About the middle of the month of December, 1912, the respondent hired to the appellant a team of horses to be used by the latter in a logging camp which it was then operating. The respondent provided a driver for the team in the person of his son, who is referred to in the testimony as a boy. After the son had driven the team for some days skidding logs, he was put at other work, and one of the appellant's employees, Ted Burke, was put in charge of the team. The son worked for a few days thereafter, when he returned home. Subsequently the team was injured, one horse having a puncture back of the left shoulder, from which injury it died, and the other walked sidewise.

The contract under which the team was hired was one of bailment for the mutual benefit of the parties. The appellant cites authority in support of the rule that, where a team is hired and the owner furnishes his own driver, the bailee is not liable for damages to the team while being driven by such driver. But this rule, conceding its soundness for the purpose of this case, is not applicable here. The team was injured after Ted Burke, one of the appellant's employees, had been put in charge as driver.

The cause was by the trial court submitted to the jury upon the theory that the appellant would not be liable unless it "took charge of the team and had its own driver in the custody of them," and unless negligence was shown. The jury were told that, while the burden was upon the plaintiff to establish negligence, yet, if it appeared from the evidence that the horses were in good condition at the time they were

received by the appellant and were in bad condition when they were returned, or that one of them was not returned at all, there would arise a presumption of negligence and cast upon the appellant the burden of showing that it had used reasonable care and caution. This instruction stated the correct rule of law as applied to the facts in this case. In *Nutt v. Davison*, 54 Colo. 586, 131 Pac. 390, 44 L. R. A. (N. S.) 1170, it was said:

"The general rule is, that in cases where the evidence shows that the property was delivered to the bailee in good condition and returned damaged, or not at all, the presumption of negligence on the part of the bailee instantly arises, making a *prima facie* case in favor of the bailor, and thereupon the bailee is under the necessity, if he would escape liability, of showing that the damage or loss was not due to his negligence. This may be done, *inter alia*, by showing that he exercised a degree of care, under all the facts and circumstances, sufficient to overcome the presumption of negligence.—*Union Pac. R. R. Co. v. Stupeck*, 50 Colo. 151; Schouler's Bailments and Carriers (3d ed.), § 23; 5 Cyc. p. 217; 3 Am. & Eng. Ency. of Law (2d ed.), p. 750; *Funkhouser v. Wagner*, 62 Ill. 59; *Higman v. Camody*, 112 Ala. 267."

This rule is recognized in *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721, though it was there held that the rule was not applicable to the facts of that case.

Some of the rulings of the trial court upon the introduction of testimony are challenged. But we find no error in this regard.

The judgment will be affirmed.

CROW, MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 11972. Department Two. February 18, 1915.]

KOHLER & CHASE, INCORPORATED, *Appellant*, v. E. L. TURNER, *Respondent*.[1]

SALES—CONDITIONAL SALES — REMEDIES OF SELLER — DEFENSES—BREACH OF CONTEMPORANEOUS CONTRACT—DAMAGES—COUNTERCLAIM. Under a conditional sales contract of goods, whereby the seller retains title thereto until payment in full, he would not forfeit such right of title from the fact that the purchaser suffered damage by reason of the seller's breach of a contemporaneous contract to diligently pursue sales prospects furnished by the purchaser, upon which a commission was to be allowed and applied on the purchase price; but such damages would merely be a subject of counterclaim, entitling the purchaser to recover for any damages actually suffered.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 18, 1913, upon findings in favor of the defendant, dismissing an action of replevin, tried to the court. Reversed.

Weter & Roberts, for appellant.

E. L. Turner, for respondent.

MAIN, J.—The plaintiff brought this action in replevin for the purpose of recovering the possession of a piano. On December 22, 1910, by conditional sale contract, the plaintiff sold and delivered to the defendant the piano in question, the purchase price of which was $850. Aside from the payment made at the time of the purchase, the purchase price was to be paid in monthly installments of $20 each. By the terms of the contract, it was provided that "the absolute ownership of said piano and the title in and to said property shall be and remain in said first party (the plaintiff) or its assigns" until "the full and complete performance by said second party (defendant) of all the conditions of this agreement by him to be performed."

On May 22, 1913, the defendant being in default upon payments then due and unpaid to the extent of $130, after

[1]Reported in 146 Pac. 393.

demand being made for the possession, the present action was instituted. The defendant answered by certain admissions and denials of the allegations of the complaint, and also pleaded an affirmative defense. In the affirmative defense it was alleged that, at the time of the purchase, a collateral oral agreement was entered into whereby Mrs. Alta P. Turner, the wife of the defendant, who was a professional musician, should furnish the names of persons who she thought might be prospective purchasers of instruments, that the plaintiff would pursue these prospects diligently, and that, in the event of a sale, a commission was to be allowed which would be applied upon the purchase price of the piano in question. By reply, the affirmative defense was denied. The cause was tried to the court without a jury. The trial court found that the oral agreement pleaded was contemporaneous with, and became a part of, the written agreement; that the defendant furnished prospects, but that the plaintiff failed to perform its part of the oral agreement, to the damage of the defendant; that the court was unable to ascertain the defendant's damage; that the defendant had paid on account of the contract $615, and that there had accrued thereon the sum of $745, together with accrued interest. In other words, there was a balance due and unpaid of $130 and interest. The court concluded, as a matter of law, "that the plaintiff was not entitled to the possession of the piano on account of the breach of the contemporaneous oral agreement." A judgment was entered dismissing the plaintiff's complaint with prejudice. From this judgment, the plaintiff appeals.

The controlling question in this case is whether the appellant, by failure to pursue the prospects furnished by Mrs. Turner, assuming that such finding is supported by the evidence, would thereby forfeit its right to rely upon the terms of the written contract which gave the right to recover possession in the event of default on the part of the vendee. No question is raised as to the right of the respondent to

plead the contemporaneous oral agreement, or to the competency of the evidence offered in support of the pleading.

The appellant claims that the extent of the respondent's remedy was to plead and prove the damage which he had sustained by reason of the breach of the contemporaneous oral agreement. The respondent claims that, by reason of this breach, he has the right to hold the piano free from that condition of the contract which provides that the title shall remain in the vendor until the purchase price is fully paid. Both parties rely, to some extent at least, for support of their respective contentions, upon the case of *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835. In that case the plaintiff brought an action to recover a piano which had been sold on a conditional sale contract. The defendant pleaded a contemporaneous written agreement, and the breach thereof, and claimed damages for such breach. It was there held that the "two contracts formed a part of the same transaction, and must be construed together," and that in an action by replevin to recover the goods sold, where there is a reservation of title in the vendor until the purchase price was paid, the vendee may, in defense, counterclaim for damages arising out of the contemporaneous agreement. There is one sentence in that opinion which, when removed from the context, would seem to support the respondent's contention. But the language of the opinion upon which the respondent here relies was used when the court was discussing the question of the right to counterclaim for damages in a replevin action. We think the court in that case did not intend to go further than to sustain the right to counterclaim for damages in the action in the case then before it. If the language of the opinion relied upon by the respondent here is to be given the effect which he claims, then it was spoken upon a question not then before the court, and would be mere dictum.

By the terms of the written contract in the present case, the vendor retained the title of the property until it should be fully paid for, and the right to recover possession thereof

in the event of default on the part of the vendee. The purpose of so retaining title was to secure the payment of the purchase price. Such contracts are valid. If the respondent prevails, it must be because the title to the piano has passed to him because the appellant failed to diligently pursue the prospects as provided for in the collateral oral agreement. If this were the rule, the security which the plaintiff retained by the written contract could be destroyed by the finding of a court or a jury that it had not fully performed the terms of a contemporaneous oral agreement. Such a rule is not supported by authority nor founded in reason. *Baird v. Grand Rapids School Furniture Co.*, 98 Mich. 457, 57 N. W. 729.

We think the rule of *Gilbert Co. v. Husted, supra*, giving the right to the vendee in a case of this kind to counterclaim for damages, should not be extended so as to destroy the appellant's security on account of the appellant's breach of the contemporaneous oral agreement. If the respondent was damaged by reason of this breach, he had a right to counterclaim for such damage. The fact that the amount of such damage would be difficult to prove should not alter the rule.

The judgment of the superior court must therefore be reversed. If the respondent shall pay the balance due on the purchase price of the piano, with interest, and all costs awarded against him within 30 days from the filing of the remittitur in the superior court, he may retain possession of the piano. Otherwise, a judgment must be entered for a return thereof, or its value.

Reversed.

FULLERTON, MOUNT, ELLIS, and CROW, JJ., concur.

[No. 11771. Department Two. February 18, 1915.]

G. J. KIEBURTZ *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS — IMPROVEMENTS — CONTRACTS — EXTRA COMPENSATION—ALTERATIONS IN PLANS. Where the contract price of a public improvement is based on a unit system, a right of recovery cannot be grounded upon a loss caused by a change in the plans of the work increasing the number of units of one class and decreasing the number in another, especially where the city is empowered by the contract to make "variations in the quantity of work to be done."

SAME. A contractor engaged in the construction of a public reservoir cannot recover for loss occasioned by a change in the amount of excavation and the necessary removal of excavated material from what he understood as necessary through an inspection of the conditions existing at the time he bid thereon, where the specifications expressly provided that the slopes of the reservoir basins were to be excavated to such depth as would reduce them to plane surfaces and this depth was to be determined by the city engineer during the progress of the work; that the excavated material was to be removed from the basins and deposited at such points as the city engineer might direct; that such excavation should be paid for at the rate bid per cubic yard, which price should include the cost of making all excavations, loading, hauling and dumping the material, and should also include trimming the slopes and bottoms and everything necessary to secure the finished result; and that the grades and lines would be given by the engineer in charge on hubs driven in the bottom and slopes of the reservoir basins.

SAME. In such a case, the contractor had no right to assume that the hubs set at the time of the bid marked the true surface of the slopes, or that gullies in the slopes were to be refilled, instead of excavating the slopes to the depth of the gullies, where the contract as to refilling referred only to refilling spaces caused by the excavation of "unsuitable materials" found in the reservoir basins.

CONTRACTS—CONSTRUCTION—EXPERT OPINION—QUESTION FOR JURY. Where a contract for construction work was of doubtful interpretation, and the opinions of experts differed thereon, raising a substantial conflict in the evidence, a question for the jury, rather than the court, is presented as to the proper interpretation, and their verdict thereon is conclusive.

[1]Reported in 146 Pac. 400.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CHARGES—ACTIONS—INSTRUCTIONS. The refusal of a requested instruction to the effect that the city engineer did not have the right under the contract to arbitrarily refuse to allow for extra work caused by changes in the plan of the work, where such changes caused a loss to the contractor, was not error, where, by instructions given, the jury were charged that, if they found that a material change had been made in the character of the work, not contemplated by the contract, and such change had materially increased the cost of the work to the contractor to his damage, the contractor was not limited to the contract price, but could recover the increased cost of the work.

SAME—CONTRACTS—INTERPRETATION BY OFFICERS—ESTOPPEL. The fact that employees in the city engineer's office agreed with the contractor as to the interpretation of the specifications for public work on a reservoir, prior to bidding by the contractor, would not estop the city from asserting that the setting back of stakes then in place as marking the slope of the reservoir was not a material change, where the call for bids named the city engineer as the person authorized to elucidate the plans, and it was not shown that the employees consulted had authority to bind the city.

SAME—IMPROVEMENTS—CONTRACTS—CHANGES. A clause in a contract for public work providing that "the city engineer or board of public works shall have the right to diminish, increase or eliminate any of the items" therein, without such action constituting "a claim for loss of anticipated profits," does not permit radical changes in the contract such as will materially reduce the profits; as entirely eliminating sidewalks around a reservoir which the contractor had sublet at a profit of $3,179, but is restricted to minor changes incidental to completion of the work, or necessary to overcome engineering difficulties.

JUDGMENT — NOTWITHSTANDING VERDICT — TIME FOR MOTION. A party is not precluded from seasonably interposing a motion for a judgment notwithstanding the verdict by suffering the case to go to the jury on the facts without interposing a motion for nonsuit, for directed verdict, or a challenge to the sufficiency of the evidence.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CHANGES—COMPENSATION. Although changes in the plans of a public contract work may belong to the inconsequential class, the contractors thereon are entitled to remuneration for expenditure incurred with a view to the performance of the omitted work, prior to notification by the city of its proposed abandonment.

SAME—PERFORMANCE—DEFECTIVE MATERIAL. A contractor on a public work is not entitled to recover for rivet iron, admittedly not of the quality required by the contract and condemned for that rea-

son, where it does not appear that the city engineer selected the rivets, as claimed, but that they were purchased by the contractors on their own responsibility.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 11, 1913, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

Preston & Thorgrimson, for appellants.

James E. Bradford and *Ralph S. Pierce*, for respondent.

FULLERTON, J.—By ordinance dated January 31, 1908, the city of Seattle authorized the construction, as part of its water system, of two certain reservoirs, known in the record as the Beacon Hill reservoirs. Subsequent thereto, it caused the basins of the proposed reservoirs to be excavated down to the rough levels of their dimensions as contemplated by the general plan. On May 24, 1910, the city, through its board of public works, adopted plans and specifications for the completion of the reservoirs; these provided for the excavation of the basins down to their neat levels; the installation of the necessary drains, inlets, outlets, and overflows; the lining of the basins with concrete and the erection of permanent barriers around them; the grading, topsoiling and seeding to clover the outer slopes of the reservoirs; the grading, putting in sidewalks, curbs and gutters, on the street bordering on the north of the reservoirs, and, in fine, the details of finished reservoirs. Estimates of the amount of excavation required to bring the basins down to their neat lines, together with estimates of the quantities of materials required to complete the work, were prepared by the city, and a call was made for sealed proposals for the performance of the work in accordance with the plans and specifications adopted. The call required the proposals to be made on a unit basis; that is to say, at so much for each several unit quantity into which the city had divided the work. The appellants in this action submitted such a pro-

posal, which the city accepted, and subsequently a written contract was entered into between them and the city for the performance of the work.

In the course of the performance of the work, the city, over the objection of the contractors, directed certain parts of the work contemplated by the contract to be omitted; and, according to the contention of the contractors, made changes in the neat lines of reservoir basins, thereby greatly increasing the amount of excavation, and greatly lessening the amount of refilling and backfilling originally contemplated, to their loss and damage. On the completion of the contract to the satisfaction of the city, the contractors sought to have the matters in dispute adjusted with the city; but, failing therein, brought the present action to recover the losses claimed to have been suffered thereby. The case was tried to a jury, which returned a verdict against the contractors on all of the items in dispute submitted to them, save one which the city confessed. In due season, after the return of the verdict, the contractors moved for a judgment notwithstanding the verdict, on the items wherein the jury found against them, and, in the alternative, for a new trial. Both motions were overruled and judgment was entered on the verdict. The contractors appeal.

The first item for which the appellants contend they should have been awarded judgment notwithstanding the verdict, is a claim for losses caused by what they conceive to be a change in the plans of the work, made subsequent to the execution of the contract, whereby a certain character of the work was eliminated and another character greatly augmented. It appears that a considerable time elapsed between the date the reservoirs were excavated and the date the city called for proposals for their completion, during which time they were left unprotected from the elements, the result being that a considerable quantity of earth had washed from the sides of the basins to the bottoms thereof, leaving the sides full of gullies and ridges which were required to be brought

to a common surface before the concrete lining of the basins could be put in place. It is the appellants' contention that, prior to bidding on the work, they examined the conditions as they existed on the ground and discovered that the gullies in the sides of the basins extended below the lines of their contemplated surfaces, if the stakes and hubs in place and the protracted measurements given on the plans indicated the true dimensions of the basins; that they interpreted the specifications to mean, in the light of these conditions, that the sides of the reservoirs would be brought to their true surfaces by filling in these gullies either with a cheap form of concrete described in the specifications, or with the earth that had washed therefrom, or with earth that they would be required to excavate from the bottoms of the reservoirs in order to insert the necessary drain and other pipes and to furnish a toe for the support of the concrete with which the sides were to be lined; that, to avoid misunderstandings and mistakes, they took the question up with the city engineer's office, as they were invited to do by the advertisement for proposals, and were assured that their interpretation of the plans and specifications was correct; that, acting upon this information, they submitted a bid of $.72 per cubic yard for excavation and $1.05 per cubic yard for refilling, to be measured in place, which bid, while sufficiently remunerative for the work of excavation were they permitted to perform the refilling work contemplated, was grossly inadequate were they required to remove the earth excavated entirely from the basins.

It further appears that, during the progress of the work, when the contractors called for the surface lines of the sides of the basins, the city's engineers set the lines in such a manner as to require such sides to be cut back to the bottoms of the gullies caused by the erosions, thus doing away entirely with any refilling of the sides, and greatly increasing the amount of excavation. The contractors estimated the amount of excavation at 6,800 cubic yards, 4,270 cubic yards

of which would be required for refilling the erosions; the city's estimate of the amount to be excavated in its call for bids was the same as that of the contractors, that is, 6,800 cubic yards (no estimate being made of any refilling), whereas the amount actually required to be excavated and removed from the basin was 12,050 yards. The work cost the contractors $20,500.48; being $11,820 more than the sum paid them by the city for the work, and, as they estimate it, $13,079.98 more than it would have cost them had they been permitted to perform the work in the manner they understood they would be permitted to perform it when making their bid.

The specifications forming a part of the contract, and material to the question here in consideration, read as follows:

"Excavation: The contractor shall make such excavation as may be necessary to bring the surface on which the concrete lining is to be placed to a true form and grade. The slopes of the reservoir basins are to be excavated to such a depth as will reduce them to plane surfaces. The depth of this excavation will be determined by the city engineer during the progress of the work. Particular attention is called to the necessity for accurately finishing the surface to be concreted, as no extra yardage in concrete will be allowed for areas excavated below grade, unless such excavation below grade is ordered by the engineer in charge. Excavation, as here specified, shall also include the removal of all earth remaining within the neat lines of the reservoir basins, the excavation of all trenches at the toe of slopes, excavation for ribs, tile drains and overflows, the surfacing of the bottom and slopes of the reservoir, where necessary, and in general, all excavation within the reservoir basins. Excavated material shall be removed from the reservoir basins and deposited at such points as may be directed by the city engineer.

"Excavation in reservoir basins as specified in the paragraph above, will be paid for at the rate bid therefor per cubic yard, measured in cut only, and the price so bid shall include the cost of making all excavations, loading into wagons, or other means of moving, hauling and dumping, and shall also include the labor of trimming the slopes and bottom of the reservoir basins to true form and grade, the furnishing and setting of all necessary guide or slope boards and everything

of whatever kind or nature necessary to secure the finished result.

"Re-filling: Where unsuitable material is found in the reservoir basin, it shall be excavated to the satisfaction of the city engineer, and such excavation will be paid for at the rate bid for excavation per cubic yard. The space so excavated shall be refilled with proper material and thoroughly tamped or rolled into place. The material thus refilled will be paid for at the rate bid for 're-filling' per cubic yard, and the price so bid shall include the cost of rolling or tamping.

"Concrete Filling: When so ordered by the city engineer, channels, or depressions, eroded in the sides and bottom of the reservoir basins, shall be re-filled with concrete which shall be mixed in the proportion of one (1) part of cement to four (4) parts of sand and eight (8) parts of gravel.

"Concrete filling will be paid for at the rate bid therefor per cubic yard in place.

"Grades and alignment: Grades and lines will be given by the engineer in charge on hubs driven in the bottom and slopes of the reservoir basin.

"(20) The city engineer shall have the right to make changes in the location, form, dimensions, grades, alignment, and make any variations in the quantity of the work to be done, as exhibited in the schedule of prices or bid for said work, and to entirely exclude any of the items of work relating to said quantities at any time, either before the commencement of the work or during the progress, without thereby altering or invalidating any of the prices herein named. Should such action diminish the amount of work that would otherwise be done, no claim shall be made for damages on the ground of loss of anticipated profits on work so dispensed with; and should such action be taken after the commencement of any particular piece of work, and result thereby in extra cost to the contractor, the city engineer shall estimate the amount to be allowed therefor which he shall consider fair and equitable, and his decision shall be final and conclusive."

The contentions of the contractors on this branch of the case can best be stated in the language of their learned counsel. They say:

"That the enlarging of the reservoir basins by setting back the slopes having entirely changed the plan of the work and the cost thereof, constituted a material alteration, which was not allowable under the contract, and that, therefore, under the authorities, the city was absolutely responsible to the contractor for the increased cost thereof. But in any event if the city did not have the right to make such change under the contract, it then came within section 20 of the specifications, which provides for payment of any increase in cost; and the action of the city engineer in refusing to allow any such increase of cost was arbitrary and did not bind appellants."

It is undoubtedly a general rule that, where a municipality lets work of a public nature to a contractor to be performed according to specific plans and specifications at a stated price for the completed work, and afterwards radically or materially changes the plan of the work so as to increase the cost of performance, or orders and directs the contractor to perform work or furnish material not within the contemplation of the original contract, the municipality becomes liable to the contractor for the increased cost of the work, or for the extra cost of the labor or material. The same rule undoubtedly applies to any work or material directed to be performed or furnished not falling within the work contemplated by the contract where the compensation is not a fixed sum for the completed work, but is a sum to be determined from a fixed price per class unit multiplied by the number of such units in the completed work. But in a work where the contract price is based on a unit system, we cannot think a right of recovery can be grounded upon a loss caused by reason of the performance of work required by the contract merely because a change in the plans of the work increased the number of units of work of one class and decreased the number in another; especially where, as in the present case, the city is empowered by the contract to make "variations in the quantity of the work to be done." And this, we think, is the basis of the appellants' claim. They do not contend that the city

ordered or required them to perform any work not designated or contemplated by the contract, or that it did not pay them at the agreed price per unit for each unit of work actually performed. Their claim is that, notwithstanding they were required to bid, and did bid, on each class of units separately as if each class was an independent work, they submitted a bid below the actual cost of the work for one class of units and an excess bid on another class, expecting to recoup their losses on one class by their gains on the other, and suffered a loss because the city changed the plans of the work so as to increase the number of units of work in the one class and reduce the number in the other. It seems to us that if this rule is to prevail, the bid affords the city no protection. The city must either forbear making the desired changes, or else answer to the contractor in a manner different from that specified in the contract.

But there is another reason which we conclude forbids a judgment *non obstante veredicto* on this item of the appellants' claim. The specifications, it will be observed, expressly provide that "slopes of the reservoir basins are to be excavated to such a depth as will reduce them to plane surfaces," and that the "depth of this excavation will be determined by the city engineer during the progress of the work." Further, that the "excavated material shall be removed from the reservoir basins and deposited at such points as may be directed by the city engineer;" and that the "excavation as specified in the paragraph above, will be paid for at the rate bid therefor per cubic yard, measured in cut only, and the price so bid shall include the cost of making all excavations, loading into wagons, or other means of moving, hauling and dumping, and shall also include the labor of trimming the slopes and bottom of the reservoir basins to true form and grade, . . . and everything of whatever kind or nature necessary to secure the finished result;" and that "grades and lines will be given by the engineer in charge on hubs driven in the bottoms and slopes of the reservoir basins." Seemingly, under these pro-

visions of the stipulation, the contractors would have no right to assume that the existing hubs and stakes, found on the ground at the time of the calls for bids, marked the true surfaces of the slopes of the reservoirs, or that the protracted measurements shown on the plans indicated their exact dimensions, but that they indicate rather that these surfaces were subsequently to be defined, and might require a greater or less amount of excavation than the hubs or the measurements indicated. Furthermore, no mention is made of refilling in this connection; it being expressly provided that the excavated material shall be removed from the reservoir basins. Nor does the clause especially referring to refilling indicate that the refilling of the gullies was contemplated. It speaks only of the refilling of spaces caused by the excavation of "unsuitable materials" found in the reservoir basins; not to existing gullies in the slopes caused by the erosions. If, therefore, the interpretation of the contract were a question for the court, we think it could not be concluded that the appellants' interpretation was the true one. On the other hand, if the contract be of doubtful interpretation, the question was properly submitted to the jury, and their verdict is conclusive against a recovery if there was a substantial conflict in the evidence, and the question was submitted under proper instructions. As to the evidence, we think there was a substantial conflict. True, the conflict was between the experts. But the question was one on which it was proper to take the opinions of experts; and, clearly, where such evidence is properly submitted to a jury, it is as much their province to determine between the conflicting opinions as it is their province to determine between other forms of disputed evidence, and their verdict upon the one is as conclusive as it is upon the other.

As to the instructions, it is not complained that those given were erroneous, but it is claimed that the court erred in refusing to give a requested instruction to the effect that the city engineer did not have the right under the contract to

arbitrarily refuse to allow for extra work caused by changes in the plan of the work where such changes caused a loss to the contractor. But we think the court did so instruct in substance. It charged the jury, in effect, that if they found that a material change had been made in the character of the work, not contemplated by the contract, and such change had materially increased the cost of the work to the contractor to his damage, the contractor was not limited to the contract price, but could recover the increased cost of the work. This instruction was not elsewhere modified or limited, and we think it sufficiently informed the jury that the right of recovery was not barred by any arbitrary act of the city's engineer.

We have not overlooked the contention of the appellants to the effect that they took up the question of the proper construction of the contract with the office of the city engineer prior to bidding on the work, and were informed that they had not misinterpreted the specifications with reference to the excavation. Had it been shown that the contractors sought this explanation of the city engineer, the person named in the call for proposals as authorized to make explanations concerning doubts or obscurities in the plans of the work, it might be that the city would now be estopped from asserting that the setting back of the stakes thought to mark the surfaces of the slope of the reservoirs was not a material change in the plans of the work as contemplated by the contract. But we are unable to find that it was so shown, or that it was shown that the person consulted had authority to bind the city; at least, it was not shown with that degree of certainty as to remove the question from the domain of the jury and make it one of law for the court. Our conclusion is, therefore, that there can be no recovery on this branch of the case.

As we have before stated, the contract called for the grading and putting in of the sidewalks, curbs and gutters, on that part of the street which bordered the reservoirs on the

north. The bid for the work was on the unit basis, and there is not in the record sufficient data to show the estimated contract price of the finished work. The record does show, however, that the appellants sublet the work to another contractor at a price which would have yielded them a profit of $3,179. The city engineer eliminated this work entirely, refusing to permit it to be performed either by the subcontractors or by the appellants. The appellants claim that the engineer's action in this regard was wrongful and that they are entitled to recover, notwithstanding the verdict, a sum equal to the sum they would have made in profit had the subcontractors been permitted to perform the work. The city claims that it was permitted to eliminate the work under the conditions of a clause in the contract, called in the record the rubber stamp clause. This was a clause stamped on the margin of the contract with a rubber stamp, reading as follows: "The city engineer or board of public works shall have the right to diminish, increase or eliminate any of the items given in the approximate list of quantities furnished by the city engineer either before or after the commencement of the work. Such changes shall not constitute a claim for loss of anticipated profits."

The appellants contend that this clause of the contract permits only such changes in the work as may be necessary to overcome engineering difficulties unforeseen at the time the contract was entered into, and such minor and inconsequential changes as may be incidental to the complete execution of work; but does not permit radical changes in the contract such as will materially increase the cost of the work to the contractor or materially reduce his profits. This contention finds support in the authorities. Mr. Wait, in his work on Engineering and Architectural Jurisprudence, § 584, deduces from the authorities the following rule:

"Where a contractor's bids are unbalanced so that his profits come from one kind of work and not from another, the company cannot deprive him of his profits by increasing

the latter work and abandoning the former, if there be a departure from the plans upon which his bids were made."

McMaster v. State, 108 N. Y. 542, 15 N. E. 417, is a leading case upon the question. It there appears that the state of New York provided for the construction of a state asylum for the insane. The buildings were to consist of a central administration building, five male wards, five female wards, a laundry, two barns and an ice house. The plans provided that the exterior facings of the buildings should be constructed of brown sandstone. After the adoption of the plans, the state authorities in charge of the construction work advertised for bids for furnishing the necessary sandstone, and McMaster's assignors, being the lowest bidders, were awarded the contract. Subsequently, the state authorities called for bids for cutting the stone required to be furnished under the prior contract, and the same persons were awarded this contract. The latter contract contained the following provisions:

"The party of the second part [the state] reserves the right to make any change they shall deem proper in the plans and specifications of said buildings, and the work shall be performed by the party of the first part in accordance, for the prices and compensation above set forth, unless such change shall increase the expense of doing said work, in which case the party of the first part shall be paid a reasonable compensation therefor, to be certified by the supervising architect and superintendent."

Immediately after the execution of the last contract, the contractors entered upon the performance of the work, and continued to furnish and cut the stone thereunder until the administration building and two of the male wards were completed. At this stage of the proceedings the state made a change in the plans of the work. It resolved to build the remaining buildings of brick with sandstone trimmings only. The remaining male wards and the outbuildings were then completed according to the changed plans. The construction of the female wards was omitted entirely. The contract-

ors then made a claim against the state for damages on account of the breach of the contracts. The claim was disallowed because of the clause in the contract above quoted; the state contending that the clause, although included in one of the contracts only, was applicable to both. In an action to recover for the breach, the court held the particular clause inapplicable to either, on the ground that there was a material and substantial change in the contract, which the state could not make without the consent of the contractor. In its discussion of the question, the court, speaking of the change in the plans of the buildings, said:

"But if we should suppose that the rule could have operation and that this clause must be taken as controlling the construction of both contracts, as it certainly must be taken as controlling the construction of the contract in which it was inserted, yet we are of the opinion that it cannot have the effect claimed for it and that it did not authorize the change made. What change did the state reserve the right to make? It certainly had no right to omit entirely the construction of all or any of the buildings. The asylum buildings referred to in the contracts were the central or administration building, the five connecting wards on each side and the outbuildings. These were all to be built. The size and height of them were fixed and the material to be put in the walls was determined. The general character of the buildings could not be changed so that the buildings would not be the same contracted for; if it could be, then a public letting in such a case would not be a useful and might be an idle ceremony. Under such a reservation could a building planned for five stories be reduced to two? Could a stone building let to a stone mason be changed to wood or brick? Could the five connecting wards be reduced to two or three or four? We are clear that authority for such extensive changes could not be found in such language. If the state could change to brick walls with sandstone trimmings, then it could change to walls made wholly of brick, and thus there would be no stone to cut and the cutting contract would be entirely nullified. It is difficult, probably impossible, to draw in advance a precise line between what is authorized by such a reservation and what is not. It authorizes such changes as frequent-

ly occur in the process of constructing buildings, in matters of taste, arrangements and details; but it does not authorize a change in the general character of the building. If it does, a contract carefully entered into could be mainly if not entirely frustrated.

"The construction we have thus given is fortified rather than weakened by construing both contracts together, as the learned counsel for the state claims they should be. Under the first contract the contractors were required to own or purchase quarries and lease them or give the control of them to the state, and thus they were required to make considerable investments for the purpose of being able to furnish the stone. Can it be supposed, under such circumstances, that the parties intended by the reservation in the second contract to authorize at the will of the state any change that might substantially destroy the furnishing contract? Would buildings with a few superficial feet of sandstone facings be the building in reference to which the competitive bidding was invited and the contracts were let? We think not, and that the contracts were broken by change from sandstone to brick."

Speaking of the omitted work, it was further said:

"The largest portion of the award made to the claimant is founded upon the omission of the state to construct the five female wards. The refusal of the state to build them, and to allow the contractors to furnish and cut the stone for them constituted a breach of the contracts which made it liable for damages. . . .

"The state was bound by its contracts just as an individual would have been bound. It might violate them, but could not repudiate or destroy the obligation of them. It was bound through its legislature to make the necessary appropriation of money for them, and to do whatever was necessary for performance on its part. The contractors did not, in entering into the contracts, take the chances that the legislature would pass the acts requisite for performance on the part of the state; but they had the right to expect and demand performance on the part of the state as if it were an individual. Now what did the state do? After the central building, the five male wards and the out-buildings were completed, and while the contractors were there with their material ready to continue performance on their part, the managers representing

the state, by resolution, on the 5th day of November, 1877, ordered them to remove all their stone from the asylum grounds within ten days. The stone referred to, or at least some of them, may be presumed to have been delivered there for the performance of their contracts. The order was peremptory to remove *all* their stone, and thereafter they were not permitted to furnish or cut any more stone, and the five female wards have never been constructed, and the legislature has never appropriated any money for their construction. We think the contractors had the right to regard the contracts as broken as to the female wards, and they were not bound to make any offer or tender of performance. The resolution of the managers was equivalent to a positive command to cease further performance on their part. It is clear that an offer of performance on their part after that would have been fruitless, as the managers, without a legislative appropriation, were powerless to perform." *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417.

Although not directly upon the point at issue, our own cases of *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393, and *Meacham v. Seattle*, 69 Wash. 238, 124 Pac. 1125, sustain the principle contended for by the appellants. In each of them it was held that, under a somewhat similar clause in a contract for a public work, the engineer in charge could not make such radical and material changes in the plans of the work as would result in material loss or damage to those participating in or affected by the performance of the contract. It is insisted on the part of the city that the right reserved in the present contract is stated with somewhat more strictness than is the right reserved in the contracts under consideration in the cases cited. This is undoubtedly true, but we think it the same in effect and governed by the same principles. Any other rule would permit the city to substitute another and entirely different work for that contemplated in the contract, thus frustrating the objects and purposes of contracts, and rendering inoperative the law requiring competitive bidding and the letting of contracts for public work to the lowest responsible bidder.

It is further insisted on the part of the city that the omission of this part of the work was not a radical or material change in the contract, when considered in connection with the work as a whole, but belongs rather to the class of immaterial and inconsequential changes, such as the city engineer had a right to make. The record before us, as we have before stated, does not show the estimated cost price of the entire work, nor does it show the actual sum paid the contractors on account thereof, although it can be gathered that the work was of considerable magnitude. But it would seem that however considerable the contract price of the work was as a whole, a change in the nature of an omission of a part of the contracted work, especially where the omitted work was ancillary to the main contract and not necessary to its successful completion, which caused a loss to the contractor of $3,179, could not be said to be immaterial or inconsequential. It is our opinion that it is a radical and material change such as the city had no right to cause to be made without rendering itself liable to the contractors for the loss it caused them.

But it is said that the question whether or not this change in the work was a material or immaterial change was submitted to the jury as a question of fact without objection on the part of the contractors or claim on their part that it should be determined as a question of law, and that, since the jury returned a verdict against them on the question, they are now estopped from claiming that they are entitled to a judgment for the omitted work as matter of law. But we think our holdings have been heretofore contrary to this contention. In *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109, we said that "it is the proper practice for a trial court, upon the hearing of a motion for judgment *non obstante veredicto*, to enter final judgment in favor of either party where it is warranted by undisputed evidence." We held to the same effect in the subsequent cases of *Fishburne v. Robinson*, 49 Wash. 271, 95 Pac. 80, and *Spokane Grain Co. v. Great Northern Express Co.*, 55 Wash. 545,

104 Pac. 794, and discussed the limitations upon the practice in *Wagner v. Northern Life Ins. Co.*, 75 Wash. 106, 134 Pac. 685; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; and *Auwarter v. Kroll*, 79 Wash. 179, 140 Pac. 326. It is true that in each of these cases, with the possible exception of the case of *Fishburne v. Robinson*, a motion for a directed verdict or a challenge to the sufficiency of the evidence had been interposed prior to the submission of the cause to the jury, but we cannot think the rule affected by this circumstance.

If a judgment *non obstante veredicto* may be entered at all by a trial court, no substantial reason exists why it should be preceded by a preliminary challenge. In many, if not in a majority of instances, it is the better practice for the trial court to take the verdict of the jury before sustaining a motion for nonsuit or challenge to the sufficiency of the evidence, as in such instances a new trial may be avoided should the appellate court on an appeal disagree with the trial court as to the effect of the evidence. It is our opinion, therefore, that a party is not precluded from seasonably interposing a motion for a judgment notwithstanding the verdict by suffering the case to go to the jury on the facts without interposing a motion for nonsuit, a motion for a directed verdict, or a challenge to the sufficiency of the evidence.

A third item is a claim for $425, loss in profits caused by the omission of the work of dressing the outer slopes of the reservoirs. This item was excluded after the contractors had expended some $200 in preparation for the work. The item itself, in view of the testimony on the part of the city regarding the feasibility of the work, would seem to belong to the immaterial and inconsequential class; at least we think it so far doubtful as to be a proper subject for the consideration of the jury, and we do not feel inclined to disturb their verdict thereon. But as the city did not make known its intention to omit the work until after the contractors had made expenditures looking towards its performance, we are of the

opinion that they are entitled to sums so expended, notwithstanding the verdict.

A fourth item is a claim for rivets, amounting to the sum of $110.50. The court withdrew this claim from the jury at the conclusion of the evidence, on the ground that it was not included in the claim of damages filed with the city. Counsel have discussed the question whether this is such a claim as is required to be presented to the city before an action can be instituted thereon, but we have found it unnecessary to determine the question. As we view the evidence submitted, there can in any event be no recovery for the item. The specifications relating to rivets provide:

"Rivet Iron: All rivet iron shall be of the best quality of double refined wrought iron, which, when broken, shall show a fine silken texture.

"It must show a tensile strength of not less than 50,000 pounds per square inch, an elastic limit of not less than 26,000 pounds per square inch, a percentage of elongation in eight inches of at least eighteen (18%) per cent, and a reduction in area of not less than twenty-five (25%) per cent. Rivets must bend flat through 180 degrees upon themselves without showing signs of fracture upon the convex side, must be soft, tough and fibrous, and must flow well in riveting."

The rivets originally furnished, under the admission of the contractors themselves, did not comply with these specifications and were unsuitable for the purposes for which they were furnished. The claim in this court is, however, that they were rivets furnished under the direction of the city engineer, and, since they proved unsuitable, the city and not the contractors should bear the loss. But it is our opinion the evidence does not justify the claim that the engineer, or any person authorized to represent the city, selected the rivets in the first instance, but, on the contrary, that they were purchased by the contractors on their own responsibility from the company from whom they purchased the pipe on which the rivets were required to be used. This being true, the city, under the clause in the specifications relating to

rivets above quoted, had the absolute right to condemn them.

Our conclusion is that the contractors are entitled to recover on the second and third items mentioned in the sum of $3,317. The judgment is therefore reversed, and remanded with instruction to enter a judgment in favor of the contractors and against the city for that sum in addition to the amount awarded by the jury.

MORRIS, C. J., CROW, PARKER, and MOUNT, JJ., concur.

[No. 12236. Department One. February 25, 1915.]

MAUD R. GLENN, *Appellant*, v. JOHN GLENN, *Respondent*.[1]

DIVORCE—GROUNDS—PLEADING—SUFFICIENCY OF CROSS-COMPLAINT. A cross-complaint for divorce by a husband sufficiently states the statutory grounds of cruel treatment and personal indignities rendering life burdensome, where it alleges that, for twelve years after marriage, their relations were agreeable; that, upon a voyage by the wife to the Philippines, she made the acquaintance of certain men, and that thereafter her disposition and conduct toward defendant were utterly changed, and instead of love and affection she manifested only hatred and aversion for her husband, denying to him his marital rights and exhibiting a cold-blooded avarice which she had never shown before, and that she was thereafter more susceptible to the blandishments of other men and maintained correspondence with other men of the most improper nature.

EVIDENCE—BEST AND SECONDARY—COPIES OF LETTERS. Properly proved copies of letters are admissible, where the originals were in the possession of the adverse party, and proper foundation had been laid by notice and demand to produce the originals, which the adverse party failed to do; their cogency and weight being for the jury.

DIVORCE—GROUNDS—IMPROPER CONDUCT—EVIDENCE — SUFFICIENCY. A decree of divorce in favor of the husband is sustained by evidence in the form of original letters, and copies of letters, where the originals were not produced on demand, written by other men to his wife, tending to show a libidinous disposition toward the wife on the part of such correspondents, and where it appeared that she took pleasure in the society of such men and apparently made no effort to cause the correspondence to cease.

[1]Reported in 146 Pac. 619.

Divorce—Defenses—Result of Divorce. Where a wife brings an action for a divorce and fails to prove her case, it is no objection to a divorce in favor of the husband on his cross-complaint, or ground for granting her a divorce, that the grounds for the husband's divorce cast a stigma upon her name and brand her as a woman of bad moral character; as she instituted the proceedings and must abide by the result.

Divorce—Judgment—Property Rights—Division—"Personal Property." Where an agreement had been made between husband and wife in contemplation of a divorce, that their personal property was to be divided equally between them, a judgment awarding the sum of $500 to the husband was not erroneous as against the wife, where there was $1,248 deposited in bank in the wife's name at the time of separation agreement, most of which she appropriated; since money is "personal property" in so far as community possessions are concerned.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 19, 1914, upon findings in favor of the defendant, in an action for divorce, tried to the court. Affirmed.

W. G. Beard and *W. A. Keene*, for appellant.

Edgar C. Snyder, for respondent.

Holcomb, J.—Plaintiff and defendant intermarried in Leavenworth, Kansas, June 3, 1897. In October, 1913, plaintiff instituted this action for divorce from her husband, the defendant, alleging cruelty, personal indignities rendering life burdensome, and incompatibility. The defendant answered, denying the material allegations in her complaint, but admitting the incompatibility and the impossibility of continuance of the marriage relation; and further, affirmatively alleged that, for twelve years after marriage, the relations of the parties were agreeable; that, about December, 1909, at defendant's request, plaintiff made a voyage on the steamer Minnesota to join him in the Philippine Islands, where he was stationed as a soldier; that on said voyage she made the acquaintance of certain men; that thereafter her disposition and conduct toward defendant were utterly changed; that she

thereafter had and manifested no love and affection for defendant, but manifested and expressed only hatred and aversion; that she thereafter denied him his marital rights, and exhibited a cold-blooded avarice which she had never shown before; that she maintained correspondence with other men; that thereafter she was more susceptible to the blandishments of other men, and conducted correspondence of the most improper nature with several men other than her husband. He also affirmatively alleged that a property settlement had been agreed upon by them, whereby, on August 4, 1913, the values and the division of certain real estate situated in King county and in Grant county, Washington, were agreed upon; and it was further agreed to divide equally all the personal property belonging to them, giving to each party a one-half interest in and to said personal property. Upon the affirmative allegations of this cross-complaint, defendant prayed that plaintiff be denied any affirmative relief under her complaint; that a divorce be granted to cross-complainant, and that the property settlement between the parties be confirmed and approved.

Upon the trial of the case, the appellant produced the testimony of about sixteen witnesses besides herself, most of which testimony was not very material, nearly all of the witnesses simply testifying to the effect that the character and conduct of the appellant, so far as the witness had ever seen, were good. As to the principal allegations of her complaint concerning the causes for divorce, the appellant was uncorroborated. The respondent was also uncorroborated as to most of the principal allegations of his cross-complaint. It will serve no good purpose to state the evidence introduced at the trial. The trial court saw the witnesses and their demeanor, made findings and conclusions, and entered a decree in favor of respondent.

The appellant contends, first, that the cross-complaint of the respondent does not state any statutory ground of divorce and is, therefore, not sufficient to warrant a decree in favor

of respondent. We consider the allegations of the cross-complaint, which have been briefly set forth herein, sufficient allegations of the statutory grounds of personal indignities rendering life burdensome and of actual cruel treatment in the respect of denial of the marital rights of the respondent for a long period of time without cause and without his consent; and, if satisfactorily proven by competent evidence, they fully warrant a decree in respondent's favor.

Appellant also urges that the court erred in receiving in evidence purported copies of letters of certain men to her. We find from the record that respondent had given notice and demand to produce the originals of these letters, that at the trial demand was made for the production of the originals, and that sufficient ground was laid for the introduction of the secondary evidence thereof. A properly proved copy of any private writing is generally competent secondary evidence when the original is shown to be lost or destroyed or in the possession of the opposite party, proper notice having been given, and the original cannot be produced. Though competent, a copy is never conclusive evidence. Its cogency and weight are for the court or jury. 3 Ency. Evidence 543. There was no error, therefore, in admitting said evidence.

This evidence, together with another letter from one of the men, the original of which was introduced, was certainly sufficient to show at least a libidinous disposition toward appellant on the part of these men, and would tend manifestly, where the appellant, a married woman, apparently made no effort to cause the correspondence to cease and where she took pleasure in the society of the men who wrote the letters, to warrant the husband in the allegations made in his cross-complaint, to warrant the court in the construction it placed upon her conduct, and to warrant the court in granting to the respondent a divorce. We have examined the record with due care, and conclude that the court was warranted in the findings, conclusions, and decree made.

Counsel for appellant urges with great emphasis that the decree in respondent's favor necessarily puts her in the wrong, casts a stigma upon her name, and brands her among her friends and acquaintances and to the world in general as a woman of bad moral character such as to justify a divorce against her in favor of respondent. To this it must be said that the appellant adopted and pursued her own course, brought this action for divorce against respondent, thereby accepting the chance of any result that might necessarily follow, and she must abide the same.

It is also contended that the court was not warranted and had no authority to render a money judgment against appellant for $500. It is contended that money belonging to the parties is not personal property. Authorities are cited to the effect that, where personal property of certain classes is enumerated, money not falling within those classes is not to be considered as personal property. The case of *Creditors Collection Association v. Bisbee*, 80 Wash. 358, 141 Pac. 886, holding that, under a statute "providing for an exemption to a householder of specified domestic animals, with a proviso that, if the householder does not possess or desire to retain the animals named, he may select and retain 'other property' not to exceed $250 in value, the 'other property' to be selected must be property of a like nature, under the rule of *ejusdem generis;* hence money cannot be selected in lieu of such exempt property," is not in point. The parties, by their agreement, in contemplation of the severance of the marriage relation, were agreeing upon the division and status of all the real and personal property. They agreed to divide equally all the personal property belonging to them. Money is undoubtedly personal property. There was at the time $1,248 of money on deposit in the bank. This the appellant appropriated to her own use, with the exception of about $220 which she left remaining in the bank, but in her name individually. The respondent was clearly entitled to $624 of this money. The

court was generous rather than exactly just in adjudging that she should refund $500 of this money, less $100 attorney's fees and the costs of the action.

We perceive no error. The decree is affirmed.

MORRIS, C. J., PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 11994. Department Two. February 25, 1915.]

NALVANA BJORNSEN, *as Administratrix etc., Appellant*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURY TO SERVANT — NEGLIGENCE — SAFE PLACE TO WORK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. No action lies for the death of an employee of two years' experience in unloading coal cars at the company's bunkers, caused by his fall into the bunkers, where it appears that the cars, of usual trapdoor construction, were driven above the bunkers, and it was necessary, by reason of the swollen condition of the trapdoors as a result of dampness, to force the doors with a crowbar, that he had been warned against the danger of standing on the coal while forcing the doors, and while working in this manner at one of the doors, it suddenly opened and carried the employee with the mass of coal into the bunkers.

SAME—SAFE APPLIANCE AND METHODS—COMMON USE. Negligence cannot be imputed from the use of coal cars with trapdoors liable to become swollen and difficult to open, when they are the class of cars commonly used by railway companies for such purposes, the doors of which commonly become swollen; since an employer is entitled to make use of the appliances common to the prosecution of his business, and is liable for injury resulting therefrom only in case the appliances and methods used are inherently dangerous and the dangers are concealed from the employees.

PLEADING—NEW MATTER IN REPLY—TIME FOR—STRIKING—DISCRETION. In an action for the death of an employee unloading coal cars at a bunker, alleged to have been caused by the use of unsafe cars, whereby the employee fell into the bunker when the trapdoor of the car suddenly opened, in which the answer set up contributory negligence and assumption of risks, new matter set up in plaintiff's reply after the case was called for trial, to the effect that defendant had caused the plaintiff to work for a longer period than sixteen

[1]Reported in 146 Pac. 575.

hours, in violation of the Federal statute, introduced a new element of damages, which would require time for preparation to meet; and, therefore, it was not an abuse of discretion on the part of the court to strike the same, in the absence of a motion for a continuance.

MASTER AND SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT—VIOLATION—HOURS FOR WORK. The violation of the Federal employer's liability act in requiring an employee to work over the time permitted by the act, does not render an interstate carrier liable for an accident to an employee, unless it be alleged and proved that the violation of the act was the proximate cause of the accident.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered September 19, 1913, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for wrongful death. Affirmed.

Frank H. Kelley and *Ralph Woods*, for appellant, contended, *inter alia*, that plaintiff was entitled to have the fact go to the jury that decedent had been working overtime, as showing the condition of his mind and body at the time of the accident. *Republic Iron & Steel Co. v. Ohler*, 161 Ind. 393, 68 N. E. 901; *Great Northern R. Co. v. Couture*, 14 Quebec K. B. 316, 7 Am. & Eng. Ann. Cas. 190. If decedent was chargeable with contributory negligence, that fact, under the Federal employer's liability act, might serve to diminish, but could not defeat, the recovery. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590. As to assumption of risk, it was decedent's duty to discharge the car of its cargo with the means at hand, if his employer provided no other and safer means, and he ought not be charged with all the responsibility of consequent injury, and was entitled to have the question of voluntary assumption of risk submitted to the jury. *Sandidge v. Atchison, T. & S. F. R. Co.*, 193 Fed. 867; *Central Vermont R. Co. v. Bethune*, 206 Fed. 868; *New York, N. H. & H. R. Co. v. Vizvari*, 210 Fed. 118; *Louisville & N. R. Co. v. Lankford*, 209 Fed. 321.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte*, for respondent.

FULLERTON, J.—The appellant, as administratrix of the estate of John Bjornsen, brought this action against the respondent, Northern Pacific Railway Company, to recover damages claimed to have been suffered by the death of Bjornsen, which death she alleged was caused by the negligence of the railway company. On the trial of the action, at the conclusion of the evidence, a challenge to its sufficiency was interposed by the railway company, which the court sustained. Judgment was thereupon entered to the effect that the appellant take nothing by her action. This appeal is prosecuted from the judgment so entered.

The evidence tended to show that the deceased was, at the time he met his death, and had been for some two years prior thereto, an employee of the railway company, engaged in the work of unloading coal cars at the coal bunkers of the railway company, situated at Tacoma, in this state. The coal bunkers were so constructed that the cars could be shunted over them on a railway track and the cars unloaded thereon through trapdoors, fitted either on the bottoms or the sides of the cars. On the day of the accident, a loaded coal car was shunted over the bunkers, having doors opening at the bottom of the car, some twelve in number, six being on each side. It was a car the body of which was made of wood, and when the catches or fastenings of the trapdoors were loosened, the doors would not open, owing to the fact that the damp coal had caused them to swell and bind upon their surroundings. This was not an unusual condition with this form of car, and iron bars were kept within reach to open the doors, which was done by forcing the bars down through the coal and hammering upon the door. When these doors failed to open after their fastenings were loosened, a coemployee of Bjornsen went after the bars with which to force them. Returning with two of them, the men climbed upon the car and proceeded with the work on opposite sides of the car. The coemployee, after opening four of the doors on his side of the car, noticed that Bjornsen was having no success; his bar,

because of having too sharp a point, would stick into the door when struck with any force. The coemployee thereupon handed Bjornsen his own bar, which Bjornsen undertook to push down through the coal. Seemingly, the point of the bar caught upon some projection before it reached the bottom of the coal, preventing Bjornsen from striking on the door. The coemployee got down from the car to ascertain what it had caught upon and whether the bar was pushed through the coal directly over the door, and while so ascertaining, Bjornsen struck the door with the bar, causing it to open. A few seconds later, Bjornsen fell through the opening with the falling coal into the bunkers below, a drop of some fifty feet, and received injuries from which he died shortly thereafter.

No one saw the position of the deceased at the time the trapdoor was opened. His coemployee testified that the deceased was standing on the coal when the bar was handed him, and inferentially it can be gathered that the deceased was so standing when the bar was pushed down through the coal, but the coemployee testified that he did not notice his position at the time the door was opened. It does appear, however, that cars of the same character and whose doors locked in the same manner had been previously unloaded by the deceased; that four of the trapdoors on this very car had been opened by the coemployee in the immediate presence of the deceased; and it appears, moreover, that the deceased was warned by the foreman, prior to his starting work on the car, not to stand on the coal when he drove open the doors, and that this warning was repeated to him by the coemployee, when the coemployee climbed down from the top of the car as before related.

At the conclusion of the evidence, the foregoing facts appearing, the trial court sustained a challenge to the sufficiency of the evidence to warrant a recovery, and directed a judgment to the effect that the appellant take nothing by her action.

The appellant sought to bring her action within the Federal employer's liability act (35 U. S. Stat. 65), and to that end alleged that the respondent was a common carrier engaged in commerce between the several states of the United States and between such states and foreign countries, and that the deceased suffered his death while he was employed by such carrier in such commerce; alleging further, in addition to the facts showing the manner of the death, matters tending to the conclusion that the death was caused by the negligence of the railway company. For answer to the complaint, the respondent denied the negligence alleged, and pleaded affirmatively contributory negligence and assumption of risk. To the answer, the appellant replied denying the affirmative allegations therein, and concluded with the following matter:

"Plaintiff further says that the deceased was required or permitted to work in unloading cars and running the same out of the bunkers down the track for a longer period than sixteen (16) hours; to wit, for a period of about thirty (30) hours prior to the accident, and that he was not in a fit condition to do the work for which he was employed."

The complaint was served on April 21, 1913, the answer on May 8, 1913; and the reply on September 17, 1913, after the cause had been set for trial, and when the parties had appeared in court for the purpose of trial. On the service of the reply, the respondent's counsel stated that he had no objections to the filing of a reply denying the affirmative allegations in his answer, notwithstanding the reply was outside of the rule time, but did object to a reply containing the new matter, as it introduced a new element of negligence which he had not come prepared to meet. He thereupon moved to strike from the reply the affirmative matter, which motion the court granted. On the trial which followed, the court also refused to permit the appellant to introduce evidence tending to prove the matter alleged.

On the evidence permitted to be introduced by the court, we have no hesitancy in saying that no cause of action against the respondent was proven. There were no hidden or concealed dangers about the work, nor any defective construction of the car or unsafe condition of the place of the work which caused the accident. On the contrary, the accident was caused either by an accident or because the deceased failed to take proper care while performing the work, and this after warning had been given him both by the representative of the master and his coemployee of the particular dangers of the work. Moreover, the previous observation and experience of the deceased with like and similar cars, and the fact that four of the trapdoors of this very car had been opened before his eyes, must have made known to him all that any amount of instruction could have taught him concerning the dangers attending upon the work.

But it is said that it was negligence to use cars for hauling coal whose doors are liable to become swollen and fail to open when the ordinary fastenings are removed, and that some other and different method of opening them ought to have been devised. But it was shown that the cars used were cars commonly used by railway companies for like purposes, and that the trapdoors of such cars quite commonly became swollen so as not to open by the removal of the fasteners, particularly in wet weather or when loaded with damp coal; and it was not shown that there was any other method of forcing open the doors which would be attended with less danger than the method used. It was not, therefore, negligence in itself to use the cars. An employer can, without becoming an insurer against accidents to his employees, make use of the common appliances in the prosecution of his business. The question in such cases is not, would something else have been better, but is rather, are the appliances and methods used inherently dangerous and are the dangers concealed from the employees. But, as we say, this work had no pe-

culiar hazards attending it; it could be performed with safety by the exercise of but common and ordinary care.

Did the court err in striking the new matter contained in the reply? We think not. Unquestionably it sought to introduce a new element of negligence in the cause, and an element which the respondent was entitled to time within which to make preparation to meet. When the appellant sought to introduce it after the case had been called for trial, it was within the court's discretion either to refuse to permit it to be introduced, or grant a continuance that the respondent might have time to make preparation to meet it. Since the appellant did not ask for or desire a continuance, we can find no abuse of discretion in striking out the new matter.

Again, we think it may be questioned whether the matter as pleaded was sufficient in itself to permit a recovery even if proven. If we concede that sufficient is pleaded in the complaint and admitted by the answer to show that the deceased was, at the time of his death, employed by the carrier in interstate commerce, we think something more must be proven than the mere violation of the hours of service act to create a liability for an accident. It must be proven that the violation of the act was the proximate cause of the accident. This proof cannot be supplied by implication. It must be alleged and proven that the accident was directly attributable to the act of working overtime.

This is the view taken of the act by the supreme court of the United States in *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265. There the court said:

"The Hours of Service Act was approved March 4, 1907, and is entitled 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon.' Chapter 2939, 34 Stat. 1415. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers which the view taken of the act by the court below imposes. We say this because although the act carefully provides

punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working over time. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employe to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of."

See, also, *Schweig v. Chicago, M. & St. P. R. Co.*, 216 Fed. 750.

Our conclusion is that the judgment must stand affirmed. It is so ordered.

CROW, MAIN, MOUNT, and ELLIS, JJ., concur.

[No. 12053. Department Two. March 1, 1915.]

F. W. OLSEN, *Plaintiff*, v. H. P. F. SMITH *et al.*, *Defendants*. J. W. JONES, *Petitioner, Appellant*, v. FRANK L. MEARES, *as Receiver etc., Respondent*.[1]

CHATTEL MORTGAGES—FAILURE TO RECORD—LABOR LIENS—PRIORITY—STATUTES—CONSTRUCTION. Although, under Rem. & Bal. Code, § 3660, providing that a chattel mortgage is void as against creditors unless recorded, a tardily recorded mortgage is prior to the rights of subsequent general creditors who have not acquired a specific lien on the property prior to the recording, a labor creditor performing labor during the interim between the execution and tardy recording of a chattel mortgage has an inchoate right of lien upon the specific property used in the operation of the business in which the labor was performed, for a period of ninety days after ceasing work, as provided and accorded to him by Id., §§ 1149, 1150; especially in view of Id., §§ 1153, which provides that the receiver or assignee of the debtor in such cases shall "pay all claims for which a lien could be filed" under the labor lien law before the payment of other debts; therefore, such labor liens, when matured by a receivership within the ninety-day period for perfecting the lien, stand upon a different footing from that of general creditors, and are superior to the lien of the chattel mortgage, of which the claimants had no notice when the labor was performed.

SAME. The fact that Rem. & Bal. Code, § 1132, declares that a mechanics' lien is preferred to an incumbrance attaching *subsequent to the commencement of the work* for which the lien is given, and also to any incumbrance which may have attached *previously to the time* and was not filed for record until after that time, of which the lien claimant has no notice, has no like restrictive bearing, as to prior unrecorded chattel mortgages, on the later act, Id., § 1149, which accords a lien for labor performed within six months next preceding the filing of the claim of lien, and declares that "no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien;" since the terms of the later act are even broader and capable of giving the labor lien precedence over all prior mortgages, although it has been construed as not intended to give to labor liens a right of priority over mortgages executed prior to the time of the commencement of the work for which the lien was filed.

Appeal from an order of the superior court for King county, Albertson, J., entered April 6, 1914, in favor of the

[1]Reported in 146 Pac. 572.

defendant, in proceedings to determine the priority between labor liens and a chattel mortgage, after a hearing before the court. Affirmed.

Chauncy L. Baxter and *J. Will Jones*, for appellant.

Frank A. Paul, for respondent.

ELLIS, J.—This case presents a contest for priority between labor liens and a tardily recorded chattel mortgage. The labor was performed in the interval between the date of the execution of the mortgage and the date when it was filed for record. The conceded facts are these: On May 29, 1912, H. P. F. Smith, doing business as Bitter Lake Lumber Company, executed and delivered to Norwood Lumber Company, a corporation, two promissory notes, each for the sum of $225, and a chattel mortgage to secure the same covering a team of horses, a harness and a wagon. By oversight, the Norwood Lumber Company failed to record its chattel mortgage until November 12, 1912. Prior to that time, the lien claimants had no notice of the mortgage. The Bitter Lake Lumber Company was then hopelessly insolvent. It ceased business about December 15, 1912, and on January 3, 1913, a receiver was appointed at the suit of labor claimants. The period of ninety days had not then elapsed since the last labor performed by any of the claimants. No notice of claim of lien for the labor had been filed prior to the filing of the chattel mortgage, but it is conceded that, under the statute, the appointment of the receiver matured the liens with like effect as if lien claims had been filed as of that date. The receiver took possession of the mortgaged property, sold it for the sum of $250, and now has the money. The two notes and the chattel mortgage were assigned by the Norwood Lumber Company to the petitioner, J. W. Jones, for value, but after the maturity of the notes. On January 30, 1914, Jones, by petition, secured an order directing the receiver to show cause why he should not pay the proceeds

of the mortgaged property to the petitioner to apply on his notes. Upon the hearing of this show cause order, the trial court held that the mortgagee had lost his priority by failing to file his mortgage within the statutory ten days after execution and delivery (Rem. & Bal. Code, § 3660 [P. C. 349 § 3]), and entered an order to that effect. The petitioner, Jones, appeals.

The record presents this single question: Is the lien of a laborer who performs work in the interval between the execution of a chattel mortgage and the time when it was tardily recorded postponed to the lien of the mortgage because he has filed no claim of lien, though the statutory period for so doing had not elapsed? The question is a new one in this state and must be solved in the main by an analysis of our own statute in the light of our own decisions.

The appellant first contends that the laborer in such a case stands in the same relation to the unrecorded chattel mortgage upon lienable property as that occupied by a general creditor who, in the interim between the making and the recording of the mortgage, extends credit to the property owner but has acquired no specific lien by attachment or otherwise. In order to a clear conception of the difference, if there is a difference, between labor creditors prior to the filing of their liens, and general creditors prior to attachment or judgment, we must consider their relation to the specific property by the statute made subject to liens for labor.

The liens here in question are governed by chapter 4, title 8, Rem. & Bal. Code, to which we shall refer by section numbers. Section 1149 gives a lien for labor upon all the real and personal property of the person, company or corporation used in the operation of the business in and about which the labor was performed, and for labor performed within six months next preceding the filing of a claim of lien. Section 1150 in effect makes the continued existence of the lien conditioned upon the filing of a notice of claim of lien

within ninety days after the claimant has ceased to perform the labor, and on the service of a copy of the notice upon the person, company or corporation within thirty days after the claim of lien is filed for record. The clear effect of these sections is to create an inchoate right of lien upon specific property in favor of laborers for ninety days prior to the filing of any lien notice. This marks a clear distinction between debts for labor and other unsecured debts; between labor creditors and general creditors. The latter have no specific lien, inchoate or otherwise, until suit and attachment or judgment. Section 1153 requires the receiver or assignee, appointed for any person, company or corporation, "to pay all claims for which a lien could be filed" under the labor lien law "before the payment of any other debts or claims other than operating expenses." This section further emphasizes and vitalizes the difference between labor claimants and other creditors in their rights and relations to the specific property. It not only recognizes the inchoate lien of the laborer created by the prior sections, but gives it precedence and makes it effective as against claims of general creditors for the full ninety days accorded for the filing of the lien notice. It is clear, therefore, that the mere definition of rights in given property as between general creditors of the owner and the holder of an unrecorded chattel mortgage thereon, does not necessarily, nor even impliedly, define rights as between the holder of such an unrecorded mortgage and the claimant of a lien for labor, even prior to the filing of the lien notice or the maturity of his lien by the property owner's insolvency.

The appellant's argument, based upon our recent decision in *Pacific Coast Biscuit Co. v. Perry*, 77 Wash. 352, 137 Pac. 483, overruling *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190, 40 Pac. 729, is therefore stillborn. It lacks the vitalizing element of analogy in the relation of the parties there and the parties here to the respective subject-matters. In the *Perry* case, we held that, though

Rem. & Bal. Code, § 3660 (P. C. 340 § 67), provides that a chattel mortgage is void as against creditors unless recorded, an unrecorded chattel mortgage is valid as between the parties and creditors subsequent to its execution who had acquired no specific lien upon the property up to the time when the mortgage was finally filed for record. This, on the specific ground that the belated filing of the old mortgage had the same effect, as against general creditors, that a new mortgage executed and filed on that day would have had. It therefore took precedence over the claims of general creditors who had acquired no lien upon any specific property, though they had extended a general credit in the interval between the making and the filing of the chattel mortgage. The clear inference from this reasoning is that had these general creditors acquired, in the interim, any sort of lien upon the specific property, they would have been preferred to the lien of the chattel mortgage. In the case here, the laborers had acquired, in the interim, subsisting rights of liens upon the specific property. They do not fall within the statutory nonpreferred class of lienless general creditors.

The case of *American Loan & Trust Co. v. Olympia Light & Power Co.*, 72 Fed. 620, cited by the appellant, announces the same view and goes no further than the decision in the *Perry* case. The case of *Urquhart v. Coss*, 60 Wash. 249, 110 Pac. 1001, rests upon the same basis. It merely sustained the right of the holder of an unrecorded chattel mortgage who had taken possession of the mortgaged property as superior to the rights of general creditors who had not, prior to that time, obtained any lien by attachment or otherwise. The case of *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211, is even more remote from the question here involved. The laborers there had lost their inchoate liens on the personal property by their failure to comply with § 1150 of the statute by serving a copy of their notice of claim of lien on the owner within thirty days after it was filed for record. We expressly withheld any

opinion on the question of priority of the labor claimants if they had complied with the statute. Clearly, none of the authorities cited by the appellant sustain the view that labor creditors, prior to the filing of their claims of lien, and general creditors, are in every sense in the same category. As we have seen, the statute itself clearly shows that they are not.

While certain expressions in the case of *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966, seem to militate against this view, that case, on careful analysis, holds no more than that the labor creditor is a creditor with all of the rights of a general creditor. It does not hold that he is simply a general creditor without additional rights. The question here presented was not involved.

Appellant's second contention, if we have clearly caught his meaning, is that even if the lien creditor differs from the general creditor in that he has an inchoate lien from the date of the performance of the work, his interest is inferior to the lien of a chattel mortgage executed prior to the commencement of the work but recorded after its performance and before the filing of the lien notice, even though the labor claimant had no notice of the mortgage when he performed the work. This is based upon the contrast between Rem. & Bal. Code, § 1132 (P. C. 309 § 61), touching the priority of mechanics' liens, and Rem. & Bal. Code, § 1149 (P. C. 309 § 117), touching the priority of labor liens. Section 1132 expressly declares the mechanics' lien a preferred lien to any incumbrance attaching subsequent to the commencement of the work for which the lien is given, and also to any incumbrance which may have attached previously to the time and was not filed for record until after that time, of which the lien claimant has no notice. Section 1149, the labor lien law, accords a lien for labor performed within six months next preceding the filing of the claim of lien, and declares: "no mortgage, deed of trust, or conveyance shall defeat or take precedence over said lien." The quoted language is obvi-

ously capable of a construction which would give the labor lien precedence over all prior mortgages. This last section, however, has been construed as not intended to give to labor liens filed in accordance with its provisions "a right of priority over mortgages which had been executed *and recorded* prior to the time of the commencement of the work for which the liens were filed." We italicize for emphasis. *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147. This is a very different thing from saying that the statute does not extend the priority of the lien over such antecedent mortgages *not recorded* prior to the commencement of the work. That decision carries the limitation of the language of the statute, capable of a much broader construction, quite as far as equity and the liberal policy of the lien law will permit. To carry the limitation still farther and give a priority to unrecorded mortgages, would set a premium on laches and encourage secret liens. It would invite abuses and frauds impossible of detection. It would enable the property owner by a secret, unrecorded and collusive mortgage for the full value of his property to defeat his laborers of their hire. On the other hand, to hold the mortgagee to his plain statutory duty of giving notice of his interest by recording his mortgage is no hardship. When he lends his money to, and takes his mortgage from, a going concern, he knows that its laborers will be entitled to liens for their pay. He then has the notice which his failure to record his mortgage will deprive the laborers of. It is no answer to say that laborers seldom examine the records and would not receive notice in any event. They at least have the right to examine the records, which is more to the point, and the records should therefore speak the whole truth.

It is argued that, since the mechanics' lien law, § 1132, was passed in 1893, and the labor lien law, § 1149, in 1897, the legislature knew of the more specific provision of the earlier law, and if the same rule of priority had been intended, the same specific terms would have been used in the

later law. In view of the use in the later act of language capable of even a broader construction than the more specific terms of the mechanics' lien law, that argument would have some force as showing that a broader priority of lien was intended for labor liens than for mechanics' liens. Obviously, it has no tendency to show that a narrower priority was intended. The advised use of the broader terms can hardly indicate a narrower intention.

The limitation of the broad language of the labor lien law touching priority, imposed by the decision in *Fitch v. Applegate*, *supra*, makes the whole law of preference as to every class of liens homogeneous. It gives the labor lien claimant the same priority expressly accorded to the mechanic and materialman. To impose a further limitation, as urged by appellant, would commit gratuitous violence to the terms of the act in order to discriminate against labor claimants, who ought to be regarded with at least as much consideration as any other class.

We conclude that a labor creditor, during the ninety days accorded for the filing of his lien claim, occupies a different relation to a prior unrecorded chattel mortgage from that held by a general creditor, in that he has an inchoate right of lien which may not be defeated by the tardy recording of the mortgage within the ninety days after the last labor was performed.

We further conclude that the lien for labor performed in the interim between the execution and tardy filing of a chattel mortgage, when perfected either by filing a claim of lien within ninety days after the last labor performed, or matured by the property owner's assignment or passage into a receivership within that period, is entitled to preference over the lien of the mortgage.

We have examined the many authorities cited from other jurisdictions, but a detailed review would be of no profit, in view of the compelling force of our own labor lien statute which declares that "no mortgage, deed of trust or convey-

ance shall defeat or take precedence over said lien." It must suffice to say that these decisions either construe lien laws in which no similar provision is found or are logically unsound.

Affirmed.

CROW, MAIN, MOUNT, and FULLERTON, JJ., concur.

[No. 12086. Department Two. March 1, 1915.]

J. E. LOUDON, *Appellant*, v. THOMAS E. SPENCER *et al.*, *Respondents*.[1]

WORK AND LABOR — PERFORMANCE OF CONTRACT — EVIDENCE — SUFFICIENCY. In an action on contract for clearing land, a finding in defendants' favor was warranted where there was evidence that the original contract was superseded by a supplemental contract agreeing to pay plaintiff a certain sum conditioned on his completing certain work and surrendering the unexpired lease, and that he failed and refused to perform the supplemental contract.

SAME — CONTRACTS — SUBSTITUTION — QUANTUM MERUIT — DEFENSES. Where plaintiff had agreed to clear land for the use of the same for two years, and after partial performance, brought action upon a subsequent agreement whereby the owner was to pay him $250 for the services performed, and plaintiff's evidence failed to sustain the allegations as to such subsequent contract, he is not entitled to recover on a *quantum meruit* for the work done under the original contract, where it further appeared that the original contract had been waived by the acceptance of a subsequent contract which plaintiff had wholly failed to perform; since the original contract had been rescinded, and *quantum meruit* cannot be awarded upon a total failure to perform the substituted contract.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 25, 1913, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Coleman, Fogarty & Anderson, for appellant.

Howard Hathaway, for respondents.

[1]Reported in 146 Pac. 612.

ELLIS, J.—The complaint in this action declared on four counts. The first and third only are involved in this appeal. They were, in substance, as follows:

First: that on February 16, 1912, the plaintiff entered into a contract with the defendants to clear a tract of about seventeen acres of their land, in consideration of the use of the same for a period of two years; that it was agreed that, if the defendants sold their ranch, of which the seventeen acres was a part, they would pay the plaintiff for the clearing done such sum as might be agreed upon at the time of sale; that the plaintiff, pursuant to the contract, cleared about four acres; that on March 15, 1913, the defendants sold their ranch, and on March 30, 1913, offered the plaintiff $250 as compensation for the clearing; that plaintiff agreed to accept that sum, but defendants have never paid it or any part of it.

Third: that defendants appropriated to their own use property of the plaintiff consisting of cedar timber worth $12, certain farm tools worth $15.50, and twenty ricks of cedar puncheons worth $40, and have paid for none of these.

The answer admitted the original contract for clearing and lease, denied the alleged supplemental agreement, denied the alleged clearing, and admitted the refusal to pay the $250 claimed in the first count; admitted the appropriation, with plaintiff's consent, of four ricks of cedar of the agreed value of $8, and denied the other averments of the third count. The answer also contained five counterclaims with which we are not here concerned.

The court found the original agreement as set up in the complaint, but found that the supplemental agreement of March 30, 1913, was that the defendants would pay the plaintiff $250 if he would complete the clearing of the seventeen acres, together with another small tract, and surrender the unexpired term of the lease; that plaintiff agreed to

this, but had failed and refused to do any clearing whatever, and was entitled to nothing on his first cause of action.

On the third count, the court found due to plaintiff, for cedar slabs and piling, the sum of $20. On all of the plaintiff's causes of action and the defendants' several counterclaims, the court found a balance in the defendants' favor in the sum of $25.37, and entered judgment against the plaintiff for that amount and for costs. Plaintiff appeals.

No question is raised as to the correctness of any of the findings, save those touching the appellant's first and third causes of action. It is urged that these are not sustained by the evidence. It is claimed that the supplemental contract was an unconditional undertaking on the respondents' part to pay $250 for the clearing then done and a surrender of the unexpired term. It is true that the appellant's testimony standing alone would tend to support this theory; but a careful consideration of the abstract and the pages of the statement of facts therein referred to convinces us that the evidence, by a clear preponderance, sustains the court's finding. Witnesses, whose credibility, so far as we are able to judge, was equal to that of appellant, testified that only about three acres had been cleared at all and those only partially. Several witnesses testified that this clearing was of little or no benefit to the land. The respondent testified to the effect that his offer of $250 was conditioned upon the complete clearing of the seventeen acres and a small additional tract; that this offer was accepted by the appellant, but he failed and refused to do any clearing whatever. We find no warrant in the evidence for disturbing the first finding.

We shall not enter into a lengthy discussion invited by appellant touching the right of a party who has partially performed his contract to recover upon a *quantum meruit*. It may be conceded that, under properly framed issues and upon sufficient evidence of the value and benefit accruing from a partial performance, such a recovery may be had,

but no such case is presented here. The appellant's first count declared upon a specific supplemental contract that he was to receive $250 for the work already done. The evidence failed to sustain it. The court found upon sufficient evidence that the substituted contract was that the appellant should receive $250 only upon completing the clearing of the seventeen acres and another small tract. By the acceptance of this contract, the appellant waived any right of recovery upon the old contract. *Waldrip v. Hill*, 70 Wash. 187, 126 Pac. 409.

"The legal effect of a subsequent contract covering the same subject-matter and made by the same parties as an earlier agreement, but containing terms inconsistent therewith, so that the two cannot stand together, is to rescind the earlier contract. It becomes a substitute therefor, and is the only agreement between the parties upon the subject." *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

This contract superseded the original agreement and remained wholly unperformed by the appellant. We fail to discover in this situation any ground, either in pleading or evidence, for a recovery upon a *quantum meruit*. While we have held that a substantial performance will entitle a party to recover upon his contract (*Taylor v. Ewing*, 74 Wash. 214, 132 Pac. 1009), we have never held that there could be a recovery, either upon the contract or upon a *quantum meruit*, where there had been no performance whatever.

The objection to the court's finding upon the third cause of action is equally lacking in merit. There was no evidence of any conversion, and the evidence as to the quantity of slabs and piling sold to the respondents clearly preponderates in favor of the court's finding.

The judgment is affirmed.

MOUNT, CROW, FULLERTON, and MAIN, JJ., concur.

[No. 12105. Department Two. March 1, 1915.]

FLORENCE MURPHY WILLSON, *Respondent*, v. HERBERT E. WILLSON *et al.*, *Appellants*.[1]

DIVORCE—GROUNDS—CRUELTY—EVIDENCE—SUFFICIENCY. A decree of divorce in favor of the wife on the ground of cruel treatment and awarding custody of their child to her, is warranted where the evidence shows that the husband was a man of ungovernable temper and often applied to his wife language and epithets to which no woman ought to be subjected, and though sharply contradictory, tends to show that the husband from the start took a domineering and uncompromising attitude toward his wife, displayed little tact or consideration in his relations toward her, and sometimes threatened physical violence, though never actually inflicting it.

SAME—DECREE — DISPOSITION OF PROPERTY — EVIDENCE — SUFFICIENCY. An award of one-half of defendant's real and personal property, on decreeing a divorce in favor of the wife, should be modified so as to give the wife a money judgment for $10,000, and $25 monthly for the support of a minor child, where it appears that the property was the husband's separate property and consisted only of unproductive lands in Alaska and the state of Washington, worth about $60,000; that a holding corporation had been formed by him, capitalized at $100,000, for the purpose of handling the same, that two-fifths of the stock had been pledged for advances made, that the property was of speculative value as well as unproductive, could not be divided without loss, and would require careful management to avoid dissipation, and that the best interests of the wife would be subserved by awarding a definite sum in money rather than by an award of one-half of the estate.

SAME—DECREE—ATTORNEY'S FEES. An award of $1,000 attorney's fees in decreeing a divorce to a wife in a hardly contested action involving some $60,000 worth of property, in which the defendant had interposed a cross-complaint, will be sustained on appeal as reasonable.

Appeal from a judgment of the superior court for King county, Humphries, J., entered January 31, 1914, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Modified.

Bates, Peer & Peterson, for appellants.

Miller & Lysons, for respondent.

[1]Reported in 146 Pac. 615.

Ellis, J.—This is an action for divorce. The complaint embodies three grounds of action, namely, cruel treatment, abandonment for more than a year, and personal indignities rendering the plaintiff's life burdensome. The facts relied upon were all set out with much particularity and detail. The prayer was for a decree of absolute divorce, for custody of the minor child, and for an award of so much of defendant's property as the court should find the plaintiff entitled to for the support of herself and the child. The answer denied generally all of these allegations of fact and interposed a cross-complaint averring cruelty and personal indignities towards the defendant on the plaintiff's part, and prayed that the plaintiff's complaint be dismissed, that a divorce be granted to the defendant, and that the court make such order for the care, custody and support of the child as might to it seem just and proper.

The parties were married in the city of Seattle on January 4, 1911. They have one child, a boy born October 10, 1911. They lived together until April 6, 1912, when the plaintiff, with defendant's consent and on his agreement to pay her $40 a month for the support of herself and the child, returned to her mother's home in Seattle, where she and the child have since remained. The evidence shows that, at the time of the marriage, the defendant owned as his separate property, real estate in and near Tacoma, Washington, and at Cordova and Fairbanks, Alaska, of an estimated value of something near $60,000; that it is largely unimproved and unproductive, and its ultimate value will be dependent upon judicious management. Some of the property is incumbered. There is no satisfactory evidence that the property has been materially increased since the marriage.

In October, 1911, the defendant with one Boone incorporated the Willsonia Investment Company as a holding corporation for the defendant's property, with a capitalization of $100,000, consisting of 1,000 shares of a par value of $100 each. The defendant conveyed to this corporation all

of his property in exchange for its capital stock, and plaintiff joined in these conveyances. All of the stock, save one share issued to Boone, was issued to the defendant. Prior to the formation of this corporation, Boone had loaned to the defendant $5,500, which was used in the conservation of the property, and as security therefor and for contemplated future advances, the defendant transferred to Boone four hundred additional shares. Subsequently Boone advanced to the defendant $1,755.70. The court found, upon what we deem sufficient evidence, that the defendant was indebted to Boone at the time of the trial in the sum of $7,255.70, and that Boone holds the four hundred shares of stock as security therefor. Boone himself so testified.

The court found specifically nearly all of the facts as alleged in the complaint in support of the charges of cruelty and abandonment against the defendant, made no finding touching the charge of personal indignities, dismissed the defendant's cross-complaint, and concluded that the plaintiff was entitled to a decree of divorce, that she was entitled to the custody and care of the child, subject to the right of the defendant to visit it at the home of her brother in the city of Seattle twice each month, that she was entitled to one-half of all of the property, both real and personal, belonging to the defendant, and to $1,000 to be paid to her attorneys for their services in the action. The decree went accordingly and, in addition, reserved to the court continued jurisdiction over all of the property with the right to make "such supplemental decree as shall be necessary in the premises for the proper husbanding, protection and distribution of the same." The defendant appealed.

Synthetically stated, the appellant's contentions are:

(1) That the findings of cruelty and desertion were not supported by the evidence; (2) That the division of the property was inequitable, not for the best interest of either of the parties, and that the court had no power to continue its

control of the same for the purpose of husbanding and distribution.

I. Touching the grounds of divorce, the evidence is voluminous. The abstract of record comprises almost four hundred pages of printed matter. It presents a tale of mutual fault finding, disagreements and bickerings, a review of which would lengthen this opinion to no useful end.

The findings of fact are much more denunciatory of appellant's conduct than is warranted by the evidence, and find many specific incidents of cruelty, some of them upon meager evidence. We are, nevertheless, clear that the finding to the effect that the appellant is a man of ungovernable temper and often applied to respondent language and epithets to which no woman ought to be subjected, was sustained by a fair preponderance of the evidence. We cannot say that the finding to the effect that the appellant while in anger had more than once threatened physical violence was not fairly established, though we do not believe that he ever committed actual violence, as found by the trial court. The evidence was sharply conflicting on all of these matters, but a careful consideration of the whole of it leaves the distinct impression that the appellant from the start took a domineering and uncompromising attitude towards the respondent and has displayed little tact or consideration in his relations to her. The evidence makes it equally clear that the respondent was not wholly free from fault. Her condition during most of the short period while the parties lived together offers some excuse for petulance and discontent, and should have moved the appellant to the exercise of a kindness and forbearance which the record fails to disclose. Upon the entire record, we cannot say that the respondent is not entitled to a decree of divorce upon the grounds of cruelty, and to the care and custody of the child. We are of the opinion that the appellant's cross-bill was properly dismissed for lack of sufficient sustaining evidence. In these matters the decree must be affirmed.

II. The disposition of the property presents a much more difficult question. While we have often held that the jurisdiction of the court in such cases is a continuing one, to the end that the welfare of minor children may be subserved throughout their minority, we know of no precedent for the action of the trial court in effect constituting itself the receiver or curator of the entire estate. It is clear that practically all of the property is of a problematical speculative value and of a nature to require careful management to avoid dissipation and loss. There is no evidence that the appellant is not competent to this task. It is manifest that, during the minority of the child, the respondent will need money rather than unproductive speculative property. Considering the nature of the property and the practical difficulty of so managing it as to produce any present income, we are satisfied that the interests of all concerned, and especially of the respondent and the child, will be better subserved by awarding to the respondent a definite sum in money to be paid at stated intervals and making the same a charge upon the stock and assets of the corporation, and a sum payable monthly for the child's support, than by giving her one-half of the entire estate in specie. For such course we are not without ample precedent. *Gust v. Gust*, 78 Wash. 414, 139 Pac. 228; *Sullivan v. Sullivan*, 52 Wash. 160, 100 Pac. 321; *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119; *Brogna v. Brogna*, 67 Wash. 687, 122 Pac. 1.

Some of the assets of the corporation are incumbered. Part of the stock has been pledged for debts and advances. We are satisfied that it cannot be divided without loss. The case is here for trial *de novo*. The evidence is all before us for a review. We are of the opinion that the decree should be modified so as to give to the respondent a judgment against the appellant for $10,000, payable $2,000 in three months from the entry of the decree, $3,000 in six months after the first payment, and $5,000 in six months after the second

payment, none of these sums to bear interest until after maturity; that there should also be awarded to the respondent the sum of $25 a month for the maintenance of the child during its minority, payable into the registry of the court on the 15th of each and every month from and after the entry of the decree; that there be allowed to respondent's attorneys the sum of $1,000 as an attorney's fee, which under the circumstances of this case we find reasonable, which sum shall be paid by the appellant within three months after the entry of the decree, without interest; that all of these charges, save the monthly payments for the child's support, be declared a lien on all of the stock and assets of the corporation, subject to any existing incumbrances thereon and subject to the pledge of the four hundred shares of stock in favor of Boone. The decree should also provide that appellant be permitted to visit the child at some suitable place other than the residence of any of respondent's relatives twice each month. The respondent may recover her costs.

The cause is remanded with direction that the decree be modified to conform to this opinion.

CROW, MOUNT, MAIN, and FULLERTON, JJ., concur.

[No. 12320. Department One. March 1, 1915.]

THE STATE OF WASHINGTON, *Appellant*, v. ROBINSON COMPANY, *Respondent*.[1]

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—FOOD—REGULATION—STOCK FOOD—STATUTES. Rem. & Bal. Code, §§ 6011-6022, regulating the sale of "concentrated commercial feeding stuffs" and defining the same as including "wheat bran, wheat middlings, wheat shorts . . . mixed feeds and mixed meals made from seeds or grains," etc., is invalid as violating the inhibition of the state constitution (art. 1, § 12), against class legislation; inasmuch as it exempts from the operation of the act cereal or flouring mills, permitting them to sell "mill bran, shorts, or middlings made in the regular process of manufacturing cereal or flour," without complying with the statutory regulations therein provided, while all others selling the same class of feed are required to submit thereto.

SAME. The act cannot be held valid by interpolating the word "only" in section 13 (Rem. & Bal. Code, § 6022), exempting cereal and flouring mills selling "only" mill bran, etc., as no such intention appears.

SAME—FOOD—REGULATION—STATUTES — PARTIAL INVALIDITY. The act cannot be held valid by the exclusion of § 13 thereof (Rem. & Bal. Code, § 6022), the section exempting cereal or flouring mills; since said section is a material part of the act, and to hold this section void and the balance of the act valid would be determining that the act applies to all persons dealing in such feed stuffs, when the legislature has expressly declared to the contrary.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 27, 1914, dismissing a prosecution for violation of the act relating to commercial feed stuffs, upon sustaining a demurrer to the information. Affirmed.

The Attorney General and *Scott Z. Henderson, Assistant*, and *John F. Murphy*, for appellant.

Donworth & Todd, for respondent.

MOUNT, J.—This is a prosecution based on an information charging the respondent with a violation of the provisions of

[1]Reported in 146 Pac. 628.

ch. 201 of the Laws of 1909, p. 705 (Rem. & Bal. Code, § 6011 *et seq.* [P. C. 163 § 149 *et seq.*]). The trial court sustained a demurrer to the information, upon the ground that the act was void as being in contravention of § 12, art. 1 of the state constitution, and upon other grounds. The state has appealed from an order of dismissal.

Section 1 (Id., § 6011) of the act above referred to is as follows:

"The term 'concentrated commercial feeding stuffs' as used in this act shall include linseed meals, cocoanut meals, gluten feeds, gluten meals, germ feeds, dairy feeds, starch feeds, sugar feeds, dried brewers' or distillers' grains, malt sprouts, feeds made from ground cereals or by-products therefrom, including wheat bran, wheat middlings, and wheat shorts, slaughterhouse waste products when sold as feeds, mixed feeds and mixed meals made from seeds or grains, and all materials of similar nature used for food for domestic animals, condimental feeds, stock feeds, and all patented proprietary or trade stock and poultry feeds for which nutritive value is claimed; but it shall not include hay or straw, whole seeds, or unmixed meals made from the entire grains of wheat, rye, barley, oats, corn or other cereals, nor wheat flours or other flours."

Section 2 (Id., § 6012) requires every manufacturer or dealer before offering such feed for sale to file with the director of the state agricultural experiment station, at Pullman, Washington, a sworn certificate setting forth, among other things, the ingredients of which the feed is composed and the percentage of certain of its constituents.

Section 3 (Id., § 6013) requires every person offering such feed for sale to affix to every package a tag or label with certain information printed thereon, and to affix a stamp purchased from the director of the experiment station, showing that the feed has been registered and the inspection tax paid.

Section 4 (Id., § 6014) requires the director of the experiment station to register the feed and to furnish stamps or labels showing the registration, with the provision that stamps must be bought in lots of $5 each for each variety of feed.

Section 5 (Id., § 6015) requires each manufacturer or dealer to file an annual statement of the number of pounds of each brand of feed sold or caused to be offered for sale in the state for the preceding year.

Section 6 (Id., § 6016) provides the fees to be paid and the annual report of the director of the experiment station.

Section 7 (Id., § 6017) prohibits the sale of non-labeled or inferior grades of feed which has not been registered and which does not contain the tag and an analysis of the feed, and fixes a penalty for a sale in violation of the act.

Section 8 (Id., § 6018) provides for samples to be taken from all packages offered for sale.

Section 9 (Id., § 6019) provides a penalty for interfering with the director of the experiment station in making inspections and obtaining samples of feed offered for sale.

Section 10 (Id., § 6020) provides that the director of the experiment station may prescribe and enforce such rules and regulations as he may deem necessary to carry the act into effect.

Section 11 (Id., § 6021) authorizes the attorney general, or the prosecuting attorneys of the several counties, to prosecute violators of the act.

Section 12 is a repeal of laws in conflict.

Section 13 (Id., § 6022) provides as follows:

"The provisions of this act shall not apply to cereal or flouring mills selling mill bran, shorts, or middlings made in the regular process of manufacturing cereal or flour."

Section 12 of art. 1 of the constitution provides as follows:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

It will be noticed that § 1 (Id., § 6011) of the act, hereinabove quoted, defines "concentrated commercial feeding stuffs" to include mixed feeds and mixed meals made from

seeds or grains, and all materials of similar nature used for food for domestic animals. That section also provides that the definition "shall not include hay or straw, whole seeds, or unmixed meals made from the entire grains of wheat, rye, barley, oats, corn or other cereals, nor wheat flours or other flours." The act prohibits the sale of concentrated commercial feeding stuffs by any person, company, corporation or agent who shall not comply with the provisions of the act. Section 13 (Id., 6022) expressly exempts cereal and flouring mills selling mill bran, shorts, or middlings made in the regular process of manufacturing cereal or flour from the provisions of the act. It is apparent, we think, that this is an unreasonable and unjust discrimination. Cereal and flouring mills are authorized to sell mixed feeding stuffs without complying with the terms of the act; while all other persons and corporations selling the same thing are required to comply with the terms of the act, which imposes onerous conditions.

In *In re Camp*, 38 Wash. 393, 80 Pac. 547, we held that an ordinance requiring a license for the peddling of fruits, vegetables, etc., but exempting farmers disposing of produce grown by themselves, was unconstitutional because it permitted growers of fruits and vegetables to sell while prohibiting others from doing the same thing. In that case we quoted from *State ex rel. Luria v. Wagener*, 69 Minn. 206, 72 N. W. 67, 65 Am. St. 565, 38 L. R. A. 677, saying:

"In the same manner as the act here in question attempts to distinguish between peddling by the manufacturer and his servant and peddling by the purchaser from such manufacturer, it attempts to distinguish between peddling by the farmer or nurseryman and peddling by the purchaser from such farmer or nurseryman; between peddling by the butcher and peddling by the purchaser from such butcher. These distinctions are arbitrary and no proper basis for classification."

In *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 130 Am. St. 1100, 21 L. R. A. (N. S.) 263, we held an ordinance of the

city of Spokane unconstitutional which attempted to regulate by licensing employment agencies. In that case we said, quoting from *Tugman v. Chicago*, 78 Ill. 405:

"An ordinance which would make the act done by one penal and impose no penalty for the same act done under like circumstances by another, could not be sanctioned or sustained because it would be unjust and unlawful."

In *Seattle v. Dencker*, 58 Wash. 501, 108 Pac. 1086, 137 Am. St. 1076, 28 L. R. A. (N. S.) 446, where a city ordinance imposed a license tax upon the sale of goods by automatic devices, which discriminated between different merchants selling the same class of goods, we held such an ordinance unconstitutional because it was in violation of the section of the constitution above referred to.

We are satisfied that, under the rule in these cases, the act under consideration is clearly in violation of the constitutional provision quoted, because it authorizes cereal and flour mills to sell mixed and unmixed feeding stuffs, while other persons selling the same feeding stuffs are required to comply with the provisions of the act. It is plain, we think, that § 13 (Id., § 6022), for that reason, renders the whole act void.

It is argued by the *Attorney General* that a similar act in the state of Indiana was approved by the supreme court of the United States in *Savage v. Jones*, 225 U. S. 501. In that case the supreme court of the United States upheld a similar act to the extent that it was not in contravention of any act of the United States or of the Federal constitution. But the Indiana act above referred to did not contain any provision similar to § 13 (Id., § 6022) of the act of this state. The question now under consideration was not in the case of *Savage v. Jones*, and the question was therefore not considered by the supreme court of the United States in that case.

The *Attorney General* further argues that § 13 (Id., § 6022) of the act under consideration should be construed to apply to cereal and flour mills selling *only* mill bran,

shorts, or middlings made in the regular process of manufacturing cereal or flour. In other words, he would have us interpolate the word "only" after the word "selling," in § 13 (Id., § 6022). But it is plain from reading § 1 (Id., § 6011) hereinabove quoted, that it was intended that cereal and flouring mills should be exempted from the provisions of the act, and that therefore such mills might sell either mixed or unmixed feeds, because in § 1 there is a provision which says that concentrated commercial feeding stuffs, as defined by that section, shall not include unmixed meals made from the entire grains of wheat, rye, barley, oats, corn, or other cereals, nor wheat flours or other flours. So that it is perfectly plain that for unmixed feeding stuffs it was not necessary to exempt cereal and flouring mills. Section 13 (Id., § 6022) was inserted for the purpose of excluding these mills from the provisions of the act.

The *Attorney General* further argues that if § 13 (Id., § 6022) is void, it may be excluded from the act, and the balance of the act may still remain a valid law. But it is apparent that § 13 (Id., § 6022) is a material part of the act. It is more than probable that if this section had not been inserted the act would not have passed. It was inserted for the purpose of excluding cereal and flouring mills from the operation of the act. To say that this section is unconstitutional and does not affect the remainder of the act is to say that every person, firm or corporation is bound to comply with the terms of the act, when the legislature itself has said that cereal and flouring mills are not bound by the act. In short, to hold this section void and the rest of the act valid is to determine, in face of an express statement of the legislature to the contrary, that the act applies to all persons dealing in concentrated commercial feeding stuffs.

We are of the opinion, therefore, that the trial court properly sustained the demurrer upon this ground. There are many other objections to the act urged in the respondent's

brief, but, in view of our opinion upon this question, it is not necessary to consider other objections.

The judgment is therefore affirmed.

HOLCOMB, PARKER, and CHADWICK, JJ., concur.

[No. 12344. Department Two. March 1, 1915.]

THE STATE OF WASHINGTON, *on the Relation of A. J. Davis, Plaintiff*, v. THE SUPERIOR COURT FOR COWLITZ COUNTY *et al., Respondents.*[1]

WATERS AND WATER COURSES—BEDS OF STREAMS—OWNERSHIP—NAVIGABILITY. Where a stream is navigable only for the purpose of floating logs and shingle bolts, and not in the general commercial sense, the title to the bed of the stream is in the owner of the adjacent land, as far as the thread of the stream, and not in the state, under Const., art. 17, § 1, asserting the state's title to the beds and shores of all "navigable" streams.

SAME—RIPARIAN OWNERS—RIGHT TO ACCUSTOMED FLOW. Where a boundary extends over the bank and into the river, the owner is a riparian owner, and entitled to damages for deprivation of the right to the natural flow of the stream in its accustomed channels without diminution or alteration, subject to the same right as other riparian owners.

SAME — BEDS OF STREAMS — OWNERSHIP — BOUNDARIES — RIVERS. Where land was purchased according to a plat describing the tract as running "to the Coweman slough, thence with the meanders of said slough" by courses and distances, "thence leaving the slough . . . to the point of beginning," the purchaser acquires title to the bed of such slough, under the rule that, where the description in a plat makes a nonnavigable stream a boundary, the boundary line is the thread of the stream and not the bank, unless a contrary intention appears from the language used in the description, and by the further rule that courses and distances must yield to natural and ascertained objects, such as a river or slough; and the "meanders" of the slough must mean a line following the sinuosities of the river.

EMINENT DOMAIN—COMPENSATION—WAIVER—RIPARIAN RIGHTS. In condemnation proceedings, the right of a riparian proprietor to as-

[1]Reported in 146 Pac. 609.

sert title to the thread of a nonnavigable stream and claim compensation therefor, is not waived by his attempt to show that he was a riparian proprietor upon a different theory and failed in his proof.

Certiorari to review a judgment of the superior court for Cowlitz county, Darch, J., entered September 9, 1914, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff for damages to property from improvements within a diking district. Reversed.

Hayden, Langhorne & Metzger, for relator.

Magill, McKenney & Brush, for respondents.

MAIN, J.—This proceeding was instituted by the petition of Diking District No. 2 of Cowlitz county, Washington, acting through its board of diking commissioners under Rem. & Bal. Code, § 4091 *et seq.* (P. C. 151 § 1). The purpose of the proceeding was to determine the damages for lands and property rights taken, and to assess the benefits which would result from the proposed improvement. The improvement was for the purpose of reclaiming, or preventing the overflow of, lands within the diking district which would be caused by the recurring high waters of the Columbia, Cowlitz, and Coweman rivers. For the purpose of carrying out this improvement, it was necessary that dikes be constructed and that dams be erected upon or across the Coweman river.

The relator here, A. J. Davis, owned a shingle mill upon or near the west bank of the north fork of the Coweman river, or the Coweman slough, as it was referred to by some of the witnesses. This north fork of the river or slough was navigable for the purpose of floating logs and shingle bolts, and was used by Davis for that purpose. The erection of the dams proposed would cause the water to cease to flow through this fork of the river. Davis was the owner of Block "B" in Wallace's addition to the town of Kelso; and it was upon this block that the shingle mill stood. According

to the plat of Wallace's addition, the boundaries of that addition were specified as follows:

"Wallace addition to Kelso begins on the east boundary of the Northern Pacific Railway 228.2 feet east of the northwest corner of the V. M. Wallace D. L. C. in section 34, township 8, north, of range 2, west of the Willamette Meridian; running thence east on the north boundary of said claim 1948.3 feet to the Coweman slough; thence with the meanders of said slough (various courses and distances), thence leaving the slough (various courses and distances) to the point of beginning."

Upon the trial, Davis claimed that the east boundary line of block "B" was the center of the Coweman slough. The district claimed that this boundary was a few feet back from the bank of the slough and was a line staked out by the surveyor at the time of platting Wallace's addition. During the trial, Davis offered evidence in an attempt to show that the line staked out by the surveyor would meet the water's edge at the time when the slough was running bank full. The jury returned a verdict assessing Davis' damages at the sum of $5,000. Thereafter motions for judgment notwithstanding the verdict and for a new trial were interposed by the diking district. The motion for judgment notwithstanding the verdict was granted. Davis brings the case here by certiorari.

There are two questions of primary importance in this case: First, Was the east line of Wallace's addition to the town of Kelso the thread of the Coweman slough or the line run upon the bank thereof by the surveyors? And second, If the legal effect of the description in the plat is to fix the boundary at the center of the slough, did Davis waive his right to claim thereunder by the fact that he offered testimony attempting to show that he was a riparian proprietor upon a different theory, and failed in his proof?

I. As already stated, the Coweman slough was navigable for the purpose of floating logs and shingle bolts, but not in the general commercial sense. Where a river is navigable

in a special sense, as here, but not in a general sense, the title to the bed of the stream is in the owner of the adjacent land, and not in the state, under § 1, art. 17 of the constitution. In *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199, speaking of a stream similar in character to that here under consideration, it was said:

"The stream must therefore be held to be a public highway for the purpose of floating logs and timber to market. Being a public highway for such purpose, what are the relations of the land owner to the stream? Thomas Dorris is the owner of the land on both sides of the stream. If such a stream as this is included in the provisions of § 1, art. 17, of the constitution of Washington, then the state is the owner of the bed of the stream below ordinary high water mark. We do not believe, however, that the said constitutional provision was intended to include streams of the character of this one, but only such as are navigable for general commercial purposes. This stream is of such a character that its use as a public highway is restricted to one purpose, viz., that of floating logs or timber; and we think a distinction must be drawn between such streams and those which are highways for general trade and commerce. The title to the bed of the stream, therefore, passed from the government to the land owner, but it is subject to the right of the public to use the stream for floating logs and timber."

If the eastern boundary of Wallace's addition was the center of the stream, it is not questioned but that Davis took to that boundary when block "B" was conveyed to him. If block "B" does extend over the bank and into the river, then Davis was a riparian owner, and as such had a right to the natural flow of the waters of Coweman slough in their natural and accustomed channels without diminution or alteration, subject only to the same right and use in every other riparian proprietor. A deprivation of such right would entitle him to damages. Upon this question, in *Kalama Elec. L. & P. Co. v. Kalama Driving Co.*, 48 Wash. 612, 94 Pac. 469, 125 Am. St. 948, 22 L. R. A. (N. S.) 641, it was said:

"The respondent, being a riparian owner upon the Kalama river, has, as such, valuable property rights which cannot be taken or damaged for the public use without compensation. One of these is its right to a continuance of the natural and ordinary flow of the water over, across, and past its lands. Gould, Waters (3d ed.), § 204. This riparian right, guaranteed by the common law, has been repeatedly recognized and protected by this court."

As to the effect of the description in the plat, the general rule appears to be, that where the description in a plat, deed, or field notes makes a nonnavigable stream a boundary, that the boundary line is the thread of the stream and not the bank, unless a contrary intention appears from the language used in the description. Where the calls in a deed or plat are to a river, naming it, "thence along the river" to a certain point, "thence leaving the river," the boundary line is the center of the stream. *Hanlon v. Hobson*, 24 Colo. 284, 51 Pac. 433, 42 L. R. A. 502; 2 Devlin, Real Estate and Deeds (3d ed.), p. 1965; Martindale, Conveyancing (2d ed.), § 104; 3 Washburn, Real Property (5th ed.), p. 436.

In *Wardell v. Commercial Waterway District No. 1*, 80 Wash. 495, 141 Pac. 1045, it was held, that a call in a deed "to the Duwamish river," meant to the center of the stream if the grantor owned title that far. The description involved in this case contains calls "to the Coweman slough," "thence with the meanders of said slough," "thence leaving the slough." If "to the Duwamish river," means to the center of the river if the grantor owns thus far, as was said in the *Wardell* case, a call "to the Coweman slough" could not well have a different meaning. After the call "to the Coweman slough," the next call is, "thence with the meanders of said slough." The latter call no doubt means a line which follows the sinuosities of the river, and the river becomes the boundary. *Schurmeier v. St. Paul etc. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Turner v. Parker*, 14 Ore. 340, 12 Pac. 495. In the case last cited, the court was considering the effect of a

description which had in it, "thence with the meander of the river." It was there said:

"Meander means to follow a winding or flexuous course; and when it is said: 'thence with the meander of the river,' &c., it must mean a meandered line—a line which follows the sinuosities of the river—or in other words, that the river is the boundary of the land claim between the points indicated."

The description as contained in the dedication of Wallace's addition to the town of Kelso, following courses and distances, would not extend the east boundary to the center of the slough. But the rule is that course and distance must yield to natural and ascertained objects. A call for a natural object, such as a river, will control as against course and distance. In *County of St. Clair v. Lovingston*, 23 Wall. 46, 62, it is said:

"It is a universal rule that course and distance yield to natural and ascertained objects. A call for a natural object as a river, a spring, or even a marked line, will control both course and distance."

It follows, therefore, that in the present case the Coweman slough was the boundary, and that this would prevail as against courses and distances mentioned in the description. The stakes set by the surveyor of the plat of Wallace's addition to the town of Kelso are not mentioned in the description upon the plat. Where the stakes were set must depend upon oral testimony. If the legal effect of a description in a deed or plat could be overcome by oral testimony as to where the stakes were set by the surveyor, and what the intention of a platter was, it would many times make the title to valuable real property very insecure. Davis, in purchasing block "B," had a right to rely upon the legal effect of the description.

It is argued, however, that the case of *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811, is controlling here as establishing that the boundary does not go to the thread of the stream. That case is distinguishable from the present in two respects:

First, there, owing to the navigable character of the stream, the title to the bed thereof was in the state. Here, the title to the Coweman slough, it being navigable only in a special sense, was in the owner of the lands bordering thereon. And second, in that case the description in the plats involved was "to the right bank" of the Duwamish river, and "thence upstream with the meanders of said right bank;" and in the supplemental plat it was stated, that the boundaries began at a certain point and extended a certain distance in a given direction to the meanders of the river. Considering the description in the original plat, and also in the supplemental plat, it was held that the boundary line extended only to the right bank of the Duwamish river, and that the description in the supplemental plat extended to the meanders of the river, and along the meanders thereof. The description here involved was to the Coweman slough, thence with the meanders of said slough, thence leaving the slough. Where the calls in a description are to the bank of a named river, thence following the named bank thereof, the boundary line does not extend beyond the bank of the river. The difference in legal effect between a description which contains calls to a *natural boundary*, such as a *river*, and a description which contains calls to the *bank* of the river, thence along such *bank*, is recognized in *Commissioners Commercial Waterway District No. 2 v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042, where it is said:

"It may be conceded that a description in a conveyance which bounds the land conveyed by a stream, if unnavigable, will be construed as meaning the thread of the stream, but where the description is specific in its language, naming the bank of the stream as the boundary of the land conveyed, we think the decided weight of authority is to the effect that the grantee's rights will not extend beyond such specified boundary so as to give him any right in the bed of the stream."

II. It appearing from what has been said that, under the description in the plat, the boundary line would be the

center of the Coweman slough, the question then arises whether Davis can claim as a riparian proprietor, in view of the fact that upon the trial he did not rely solely upon his legal rights under the description, but sought to supplement this by testimony which he claimed would show that he was a riparian proprietor, even considering the line staked upon the bank by the surveyors, and failed in this attempt. According to the description set out in the plat, the legal effect thereof was to fix the boundary at the thread of the river. The eastern boundary of block "B," which Davis owned, would coincide with the boundary of the plat. Under this description, he owned title to the thread of the stream. Owning title thus far, we think the fact that he attempted to establish an additional right, and failed, would not deprive him of the right to assert title which he acquired by virtue of the legal effect of the description in the plat. It follows that the trial court erred in entering judgment notwithstanding the verdict, and for this error the judgment will be reversed and the cause remanded.

Reversed.

CROW, MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12142. Department One. March 2, 1915.]

E. M. Heine, *Appellant*, v. J. M. Hall, *as Mayor of the Town of Tukwila et al., Respondents.*[1]

Appeal—Record—Abstract—Sufficiency. An abstract of the record required on appeal is insufficient when it does not purport to abstract any of the evidence incorporated in the statement of facts, nor make citations to the transcript.

Appeal—Bond—Notice—Time for Filing. An appeal must be dismissed where the appeal bond was not filed within five days after service of the notice of appeal, under Rem. & Bal. Code, § 1721, providing that an appeal shall become ineffectual for any purpose unless the appeal bond is so filed.

Appeal from an order of the superior court for King county, Albertson, J., entered February 9, 1914, dismissing an application for a writ of mandate to compel an election for the purpose of disincorporating a town, after a hearing before the court. Appeal dismissed.

Richard Gowan, for appellant.

James A. Snoddy, for respondents.

Crow, J.—This is an appeal from an order dismissing plaintiff's application for a writ of mandate, to compel the council and mayor of the town of Tukwila to order a special election for the purpose of disincorporating the town and electing a receiver to wind up its affairs. The application purports to have been made under the provisions of Rem. & Bal. Code, § 7460 *et seq.* (P. C. 77 § 567). Plaintiff's second amended affidavit, upon which his application for a writ is based, alleges: That the town of Tukwila, situated in King county, is a municipal corporation of the fourth class; that plaintiff was a duly registered elector therein, and that on February 11, 1913, the following petition was presented to and filed with the town council:

[1]Reported in 146 Pac. 577.

"To the Honorable Mayor and City Council of Tukwila:
"We, the undersigned, constitute a majority of the lawful registered voters of the incorporated town of Tukwila, King county, Washington, hereby respectfully petition that the said town of Tukwila be disincorporated in the manner provided by the laws of the state of Washington, and that an election be forthwith ordered to be held in said town for the purpose of determining whether or not said incorporation shall be dissolved, and for the further purpose of winding up the affairs of said town in case of dissolution."

It is further alleged that the petition was signed by a majority of the duly registered electors of the town; that on February 11, 1913, the municipality had a population of less than 3,000, and that the councilmen, for the purpose of continuing themselves in office and for other fraudulent reasons, rejected the petition and refused to order an election. Thereafter the trial court issued an alternative writ of mandate, which defendants moved to quash. This motion was overruled, and an answer was interposed, which alleged that the petition was rejected for the reason that, after due and careful consideration, the town councilmen, acting in their official capacity, determined that it was insufficient, and that it did not have the requisite number of signatures to comply with the statute. The issues having been thus framed, evidence was introduced, upon consideration of which the trial court dismissed the application. The plaintiff has appealed.

On the argument, respondents, contending that no jurisdiction has been conferred upon this court, made an oral motion to dismiss the appeal for want of a sufficient abstract, and for the further reasons that the notice of appeal was not filed in time after its service, and that the appeal bond was not filed within the statutory time after the service and filing of the notice of appeal. Without discussing the abstract at length, we will state that it is absolutely insufficient, as it does not purport to abstract any of the evidence incorporated in the statement of facts, nor does it make citations or references to the transcript.

Without regard, however, to the abstract, the appeal must be dismissed for the reason that it has not been properly perfected. The record shows that the final judgment of dismissal was entered on February 9, 1914; that the notice of appeal was served on March 31, 1914; that proof of such service was not made or filed until June 4, 1914, and that the appeal bond was not filed until April 11, 1914. If it were conceded that the notice of appeal was filed on March 31, the date of its service, a fact which does not appear from the record, it is nevertheless apparent that no attempt to file any proof of service was made prior to June 4, 1914. The record also discloses the fact that the appeal bond was not filed until April 11, 1914, more than five days after the service of the notice of appeal. Rem. & Bal. Code, § 1721 (P. C. 81 § 1193), provides that an appeal in a civil action or proceeding shall become ineffectual for any purpose unless, at or before the time when the notice of appeal is given or served or within five days thereafter, an appeal bond be filed with the clerk of the superior court. The appeal bond in the action before us was filed neither before the giving of the notice of appeal nor within five days thereafter. It is, therefore, ineffectual for any purpose.

The appeal is dismissed.

Morris, C. J., Chadwick, and Parker, JJ., concur.

[No. 12506. Department One. March 2, 1915.]

The State of Washington, *Respondent*, v. Fred C. Moore, *alias E. Lovelock, Appellant*.[1]

Criminal Law—Evidence—Other Crimes. In a prosecution for grand larceny by false pretenses in that accused procured a bill of sale of certain property by giving in exchange a deed to lots he did not own and a check on a bank where he had no funds, evidence that the bill of sale was altered after execution so as to include additional property is inadmissible, under the rule forbidding the admission of evidence of other crimes than the one charged in the information.

False Pretenses—Defenses—Mistake — Evidence — Admissibility. In a prosecution for grand larceny by false pretenses in giving a check on a bank where he had no funds, which defendant had claimed was a mistake and had at the time offered to give a check on a bank in which he had a deposit, his bank account book showing a balance in his favor in the latter bank is admissible in evidence for the purpose of showing his claim of good faith in the transaction, and his ability to substitute a good check for the one drawn against no funds.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 13, 1913, upon a trial and conviction of grand larceny. Reversed.

E. H. Chavelle and *A. A. Booth*, for appellant.

John F. Murphy and *Crawford E. White*, for respondent.

Morris, C. J.—Appellant was convicted under an information charging grand larceny by false pretenses. The only errors alleged to which we will refer are in the admission and rejection of testimony.

The complaining witness was the owner of a concrete mixer and other like equipment which he advertised for sale. The appellant, answering the advertisement, offered in exchange real property and cash. A meeting was arranged, and appellant showed Brady, the complaining witness, two lots in

[1]Reported in 146 Pac. 627.

Hazelwood addition to Seattle, which Brady agreed to accept, with $200 in cash. There is a dispute as to the lots shown; Brady claiming that he was shown lots six and seven in block eight, while appellant contends he was shown lots six and seven in block nine. Brady agreed to accept the two lots and $200 cash in exchange for his property, and with appellant went to the city hall to examine a map to ascertain the correct description of the lots. Appellant asserts that while he was certain as to the lots being numbered six and seven, he was not clear as to the block number. Arriving at the city hall, Brady examined a city map and satisfied himself that the lots shown him were six and seven in block seven, and so dictated the description to the appellant, who thereupon wrote a deed so describing them. A trip was then made to Auburn, where Brady's property was stored. The parties then returned to Seattle, where appellant stepped into a bank, procured a blank counter check, and drew a check upon the American Savings Bank & Trust Company for $200, signing it "Rainier Contracting Co., per E. Lovelock." A bill of sale was then given appellant for the mixer and other property.

These transactions occurred late in the afternoon of March 5th. The bill of sale and deed were dated March 6th and the check March 8th. On March 6th, Brady presented his check for payment at the bank upon which it was drawn, and payment was refused on account of no funds. The next day Brady met appellant and informed him that the bank had refused payment on the check, and that he had learned that appellant had no title to lots six and seven, in block seven, of Hazelwood addition. Appellant, when shown the check, claimed he had made a mistake in the bank, and offered Brady a check on the Scandinavian-American Bank, where he had made a deposit of $200 on March 6th. He also offered to give a new deed correctly describing the lots he claimed to own. After some parleying, in which each party made demands upon the other for a money consideration to "call

the deal off," Brady went to the office of the prosecuting attorney and entered a complaint, upon which this action was instituted.

We find one error in the record which demands a reversal. The state produced the notary public before whom the bill of sale was executed, and, over appellant's objection, the witness was permitted to testify that additional property had been included in the bill of sale subsequent to its execution. This was a plain violation of the well known rule that evidence of other crimes than the one charged in the information is not admissible, save in certain well recognized exceptions not here present. The lower court recognized this rule and applied it when the state subsequently offered a handwriting expert to prove its theory of subsequent changes in the bill of sale, and referred to the ruling in the admission of this testimony as "dangerous ground." No attempt, however, was made to correct the previous error, and there is no alternative but to hold that it is fatal to the judgment.

As a new trial is to be had, we will notice one other alleged error. Appellant offered in evidence a savings bank account book of the Scandinavian-American bank showing a balance in his favor on March 6th of $1,500, for the purpose of showing his claim of good faith in the transaction, and his ability to draw a good check when he made the offer to substitute a check on this bank for the one drawn on the bank which had refused payment of the first check. The offer was denied. We think this evidence should have been admitted, as it might have been accepted by the jury as some evidence at least of appellant's claim of good faith and lack of criminal intent in the transaction, its value for such purpose being for the jury.

The judgment is reversed and a new trial ordered.

Mount, Parker, Holcomb, and Chadwick, JJ., concur.

[No. 12262. Department One. March 3, 1915.]

MELVILLE GUERRIERI, *Appellant*, v. INDUSTRIAL INSURANCE COMMISSION, *Respondent*.[1]

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — "EXTRA-HAZARDOUS" EMPLOYMENTS — STATUTES — CONSTRUCTION. The operation of a passenger or freight elevator is not an extra-hazardous employment entitling the operator to compensation for injuries within the definition of the workmen's compensation act, 3 Rem. & Bal. Code, §§ 6604-2, 6604-3, which includes "factories, mills . . . breweries, elevators, wharves, docks . . ." etc., since the context and setting of the words indicates a legislative intent to cover classes of business rather than particular pieces of machinery, and the use of the words "passenger and freight elevators" in § 6604-4, under the classification of "construction work," shows that the statute means those engaged in the manufacture or construction of freight and passenger elevators; especially in view of the fact that the schedule of rates to be paid does not specifically cover passenger or freight elevators, but does include the operation of grain elevators.

Appeal from a judgment of the superior court for King county, Webster, J., entered December 13, 1913, sustaining an order of the industrial insurance commission rejecting a claim for personal injuries sustained by an elevator boy. Affirmed.

Brady & Rummens and *Clise & Poe*, for appellant.

The Attorney General and *John M. Wilson, Assistant*, for respondent.

CHADWICK, J.—The only question raised by this appeal is whether one who is engaged in operating a passenger and freight elevator or lift in a mercantile establishment is a workman engaged in an extra hazardous employment and entitled to compensation under the workmen's compensation law, ch. 74, Laws of 1911, p. 345 (3 Rem. & Bal. Code, § 6604-1 *et seq.*).

It is the holding of the industrial insurance commission and of the *Attorney General* that operators of elevators are

[1]Reported in 146 Pac. 608.

not within the terms of the law. It was so held by the court below.

Section 2 (Id., § 6604-2) of the act classifies employments "inherently constantly dangerous" and therefore "extra hazardous" as follows:

"Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction-works, breweries, *elevators*, wharves, docks, dredges, smelters, powder-works; laundries operated by power; quarries; engineering works; logging, lumbering and ship-building operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam heating or power plants, steamboats, tugs, ferries and railroads."

It is the contention of appellant that the word "elevators," which we have italicized, means freight and passenger elevators.

When tested by the ordinary rules of statutory construction, we think it is clear that this is not so. The context of the section, the setting of the word, indicate a legislative intent to cover classes of business rather than particular pieces or kinds of machinery. Thus: "factories, mills, . . . breweries, elevators, wharves, docks, . . . &c."

Section 3 (Id., § 6604-3) defines certain terms and classes of business. "Mill" means "any plant, premises, room or place where machinery is used &c. . . . including elevators, warehouses and bunkers."

Section 4 (Id., § 6604-4) schedules the rates to be paid. No schedule specifically covers passenger or freight elevators. In the same section under the subhead "Construction Work," industries are classified. In class 5 are found the words "freight and passenger elevators." Here as before, the context and setting of the words indicate that the statute means those engaged in the manufacture or work of construction of freight and passenger elevators. Bearing in mind the title

of the classification "Construction Work," the paragraph reads:

"Iron or steel frame structures or parts of structures; fire escapes; erecting fire-proof doors or shutters; blast furnaces; concrete chimneys; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin work; marble, stone or brick work; roof work; slate work; plumbing work; metal smokestack or chimneys; advertising signs; ornamental metal work in buildings; carpenter work not otherwise specified; marble, stone or tile setting; mantel setting; metal ceiling work; painting of buildings or structures; concrete laying in floors or foundations; glass setting; building hot houses; lathing; paper hanging; plastering; wooden stair building." 3 Rem. & Bal. Code, § 6604-4.

This conclusion is fortified by reference to Class 21, page 354. Under the sub-title "Operation (including repair work)" we find the classification "Grain elevators." This brings section 4 into harmony with sections 2 and 3, and makes it certain that there was no purpose to cover the operation of an ordinary freight or passenger elevator or to recognize it as an extra hazardous occupation or as one inherently dangerous.

The manifest intent of the law is not to cover and compensate for accidents generally, but to cover accidents occurring in those employments or occupations which are specifically classed as, or which may be found by the commission to be, extra hazardous.

Affirmed.

MORRIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 12400. Department One. March 3, 1915.]

ELIZABETH MARIE SURRY, *Respondent*, v. HENRY SURRY *et al.*, *Appellants*.[1]

DIVORCE—ALIMONY—APPEAL — SUPERSEDEAS — LIABILITY ON BOND. Upon an appeal by a defendant in a divorce suit from an order adjudging him in contempt of court and directing his imprisonment for failure to pay a decree for weekly alimony, a supersedeas bond conditioned to pay all costs that shall be adjudged against him on the appeal, and to satisfy and perform the judgment or orders appealed from in case they or either of them shall be affirmed, covers only the alimony due at the time the appeal was taken; and on affirmance, the sureties are not liable for alimony accruing pending the appeal.

PROHIBITION—TO COURTS—WHEN LIES—PENDING APPEAL—DIVORCE —ALIMONY. Upon an appeal from an order adjudging defendant in a divorce case guilty of contempt for failing to pay weekly alimony, prohibition lies to prevent the superior court, pending appeal to the supreme court, from attempting to enforce its judgment by imprisonment, for future as well as past installments of alimony, on the ground that the trial court is without jurisdiction after appeal to imprison in aid or in execution of its judgment, and on the further ground that a citizen cannot be vexed in his person, liberty or property pending an appeal to a court having jurisdiction to settle the law of his case.

DIVORCE—ALIMONY—APPEAL—BONDS — SUPERSEDEAS — ACTION ON. In an action upon a supersedeas bond given on appeal by a defendant in a divorce suit from an order adjudging him in contempt of court for failure to pay an installment of alimony, the liability of the defendant for installments of alimony falling due pending the appeal cannot be determined; as that is to be determined in the divorce suit.

Appeal from an order of the superior court for King county, Humphries, J., entered May 23, 1914, in favor of the plaintiff, on the pleadings, in an action on a supersedeas bond. Reversed.

C. S. Goshert, for appellants.

Thomas B. MacMahon, for respondent.

[1]Reported in 146 Pac. 613.

CHADWICK, J.—This action was brought to recover on a supersedeas bond. The principal parties are not strangers to this court. *State ex rel. Surry v. Superior Court*, 74 Wash. 689, 134 Pac. 178; *Surry v. Surry*, 78 Wash. 370, 139 Pac. 44. We shall speak of them as appellant and respondent.

On June 14, 1913, the court below entered an order requiring appellant to pay alimony at the rate of ten dollars a week, and twenty-five dollars attorney's fees to be paid on July 1, 1913, and twenty-five dollars to be paid on August 1, 1913.

Appellant not having met the order of the court in any way, was cited under a rule *nisi* to show cause why he should not be adjudged in contempt of the court, the order being:

"It is considered, and the court does hereby order, adjudge and decree that defendant be and he is hereby declared to be in contempt of court for failing and refusing to pay to plaintiff alimony heretofore ordered by the court to be paid, and unless defendant purge himself of said contempt and pay said alimony within 24 hours he shall be arrested and confined in the jail of King county, Washington, until further order of this court."

Appellant did not purge himself, either by payment or by a showing of excusatory facts. Whereupon the court adjudged him guilty of contempt saying:

"It is ordered that defendant, Henry Surry be, and he is hereby committed to the jail of King county, Washington, there to remain imprisoned until alimony allowed in this cause be paid, or he be released in due course of law and the clerk of said county is hereby directed to issue a writ of attachment committing said defendant to the custody of the sheriff of King county, Washington, to be confined, as aforesaid until released as aforesaid."

Appellant then appealed, giving a supersedeas bond. After reciting *in haec verba* the prior proceedings and the several orders of the court, the parties obligated themselves:

"Now, therefore, if the said Henry Surry shall pay to Elizabeth Marie Surry, the plaintiff above named, all costs and damages that shall be adjudged against him on the appeal or the dismissal thereof, and will satisfy and perform the judgment or orders appealed from in case they or either of them shall be affirmed and any judgment or order which the supreme court may render or make, or order to be rendered or made by the said superior court not exceeding in amount or value the above named sum of five hundred ($500) dollars, then this obligation to be void, otherwise to remain in full force and effect. Dated at Seattle, Washington, this 2nd day of July, 1913. Henry Surry, Principal, D. W. West, H. F. Olschewsky, Sureties."

The case was affirmed on appeal. After the remittitur went down, appellant was served with an *alias* warrant. He paid the amount due at the time the appeal was taken. Thereafter respondent began this suit against appellant and his bondsmen to recover the sum of $480, that being the amount of alimony which had accumulated while the appeal was pending. The case was assigned to the department of the superior court which is presided over by Honorable John E. Humphries, who gave judgment upon the pleadings for the amount prayed for, upon the assumption that the bondsmen were bound to pay the accumulated alimony.

Several assignments going to a denial of a change of venue from Judge Humphries to some other judge are urged in the briefs. It will be unnecessary to discuss these assignments, since it seems clear to us that no cause of action has been, or can be, stated against the appellants.

A bond will not ordinarily be construed to hold a surety beyond the terms of his engagement. It is plain that the primary object, and as we read the bond, its express engagement was to secure the liberty of the appellant pending a review of the commitment by this court. It is not an engagement to pay in any event or forever. It refers to and adopts the words of the orders appealed from. By its terms and recitals, the sureties have engaged to pay no more than

the amount due at the time. A bond to be obligatory must operate upon something, and to say that the sureties engaged to meet the penalties of a possible fifty-two contempts in each year and indefinitely, would be to make an engagement for them instead of construing the one they did make. If the bond is to be given that construction, it would follow that it is continuing, and although appellant met and discharged the decree of the court literally, paying ten dollars a week for fifty weeks and then defaulted for one or more weeks, the bondsmen would be liable. The argument refutes itself.

Respondent assumed the law to be as we have stated it. After the appeal had been taken and the bond given, she procured a citation to be served upon appellant to show cause why he should not be further adjudged to be in contempt. Appellant then sued out a writ of prohibition in this court. We held that the lower court was without jurisdiction to so proceed pending the appeal. Respondent contends:

"This court, in *State ex rel. Surry v. Superior Court*, 74 Wash. 689, in effect held the appeal from the order in question was from the entire order, not merely from the installments due at the time of the appeal, and the enforcement of the installments was superseded by the bond, and the sureties are liable. It is so nominated in the bond."

Such conclusion does not follow. The court was not then or there passing upon future payments, or possible contempts, or binding the sureties to pay something for which appellant might be entitled to exoneration upon a showing of inability or necessity. The question was one touching the right of personal liberty. Appellant had not been adjudged guilty of contempt for failure to pay any sums falling due after June 30. *Surry v. Surry*, 78 Wash. 370, 139 Pac. 44. As to subsequent payments, those maturing after July 1st, we had nothing to do. Our holding was that no man should be "compelled to appeal from and supersede an order of commitment once a week until the case is tried on its merits"

(*State ex rel. Surry v. Superior Court*, 74 Wash. 689, 134 Pac. 178), or deprived of his liberty pending an inquiry into the right of the court to imprison in execution of a personal judgment.

"The result of the threatened action of the court would be to deprive the relators of the fruits of their appeal and to render the appeal nugatory, and under the authority vested in this court by art. 4, § 4, of the constitution of the state of Washington, it has the power in aid of its appellate jurisdiction to prohibit a superior court from exceeding its jurisdiction in such a matter." *State ex rel. Schloss v. Superior Court*, 3 Wash. 696, 29 Pac. 202.

The issuance of the writ of prohibition may be sustained upon two grounds; first, an appeal having been taken, the trial court was without jurisdiction to imprison in aid of or in execution of its judgment. *State ex rel. McDonald v. Superior Court*, 6 Wash. 112, 32 Pac. 1072; *State ex rel. Notal v. Davey*, 37 La. Ann. 827; *Fite v. Black*, 85 Ga. 413; High, Extraordinary Legal Remedies, § 789.

"When an appeal is taken in a case in the manner prescribed by law, so that the judgment of the court is suspended, jurisdiction of the case is transferred from the court appealed from to the appellate court, and the former will be prohibited from attempting to enforce its judgment or otherwise invading the jurisdiction of the appellate court." 16 Ency. Plead. & Prac., p. 1116.

It is thus apparent that a writ would probably have been issued irrespective of the form of the bond. There was a loss of jurisdiction pending an inquiry into the right of the trial court to collect future as well as past and overdue payments by coercive methods.

Secondly: The writ of prohibition is akin to an injunction. The one goes to the individual, the other is a supervisory writ restraining an inferior court or officer when acting without jurisdiction or in excess of jurisdiction. Rem. & Bal. Code, § 1027 (P. C. 81 § 1781).

Injunctions are freely granted to restrain vexatious suits, and to restrain successive proceedings pending an appeal where the appeal will determine the legal rights of the parties. There is no difference in principle. The object sought, whether by the one remedy or the other, is the same. It is enough that a citizen cannot be vexed in his person, liberty or property pending an appeal to a court having jurisdiction to settle the law of his case.

The liability of appellant to answer for his failure to make all subsequent payments of alimony is a matter arising in, and to be determined in, the proceeding pending in the court below. A judgment against him in this case is not warranted or necessary.

It is ordered that the case be reversed, and remanded with instructions to dismiss.

MORRIS, C. J., HOLCOMB, PARKER, and MOUNT, JJ., concur.

[No. 12428. Department Two. March 5, 1915.]

ESTHER WAGNER *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—CLAIMS FOR DAMAGES—AMENDMENT. A claim for personal injuries, filed under a city charter requiring the claim to embrace all items of damage known at the time, cannot be amended at the trial so as to include a known item for the employment of a nurse, not included in the claim as filed.

APPEAL—REVIEW—HARMLESS ERROR—REMISSION. The erroneous inclusion of a $65 item of damages does not warrant a reversal; since it may be deducted from the amount of the judgment.

MUNICIPAL CORPORATIONS—CLAIMS FOR DAMAGES—AMENDMENT. Allowing a trial amendment of a claim for damages against a city as to the claimant's street number, changing the number from 218 to 208, is not prejudicial error, where there was a *bona fide* attempt to comply with the law and the notice accomplished its purpose of giving the city an opportunity to investigate the claim; the claimant having lived at 208 for six years and being well known to the occupants of No. 218, where proper inquiry would have disclosed claimant's residence.

APPEAL—REVIEW—HARMLESS ERROR. It is harmless error to allow the amendment of a claim against a city where no evidence was offered to prove the item of damages added by the amendment.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 11, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by reason of a defective sidewalk. Reversed, unless $65 is remitted.

James E. Bradford and *Melvin S. Good*, for appellant.

Rosenthal & Aaron and *Philip Tworoger*, for respondents.

MORRIS, C. J.—Action for personal injuries claimed to have been sustained from a fall upon a defective sidewalk. Verdict and judgment for $325 in plaintiff's favor, the injuries being slight, from which the city appeals.

[1]Reported in 146 Pac. 621.

The error urged against the judgment is that the trial court permitted respondents to amend the claim filed with the city so as to embrace items of damage known to respondents at the time the claim was filed, but not included therein. The injury occurred on November 19, 1911. The claim was filed December 16, 1911. It sets forth the particulars as to the place and character of the injury and the damage sustained, but makes no reference to the employment of nurses, nor any claim of damages caused by such employment. On the trial, respondents offered testimony to the effect that they had expended $65 in the employment of a nurse. The city objected as not being within the claim filed. The lower court overruled the objection, and permitted respondents to amend the claim so as to include this item. The amendment also included a change in respondents' address from 218, 21st avenue, as given in the claim filed, to 208, 21st avenue.

The charter of the city of Seattle provides that, all claims for damages shall "contain all items of damage claimed." Rem. & Bal. Code, § 7995 (P. C. 77 § 133), provides that, such claims shall state the residence of the claimant at the date of the filing and for six months immediately prior thereto. Provisions of this character have uniformly been sustained, and must be complied with when, as here, the items are known at the time of the filing of the claim. *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840. The provision requiring the filing of a claim being statutory in its nature, there can be no amendment without statutory authority. There is no such authority in this state, and we must hold that such claims cannot be amended at the trial so as to include items of damage known at the time of the filing of the claim but not included therein. It was, therefore, error for the lower court to permit the amendment, but it does not follow that the judgment must be reversed, since the error can be remedied by deducting from the judgment the sum of $65, the amount paid

for nursing. We do not mean to be understood in so holding, that claims of this character must be construed with such exactness as to preclude evidence of those injuries not specifically mentioned in the claim, but which naturally and proximately flow from the injuries described in the claim. Evidence of such proximate results is admissible without reference to the claim. *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383.

While the lower court was not justified in allowing the amendment of the claim as to respondents' street address, it does not follow that this was error so prejudicial as to call for a reversal, since the evidence of the correct address was admissible without the amendment. The obvious purpose of these charter and statutory provisions is to insure such notice to the city as to enable it to investigate the cause and character of the injury, and where there is a *bona fide* attempt to comply with the law, and the notice filed actually accomplishes its purpose of notice, it is sufficient though defective in some particulars. *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449.

In *Frasier v. Cowlitz County*, 67 Wash. 312, 121 Pac. 459, it was said:

"The purpose of these provisions, as applied to a claim arising from a tort is to enable the municipality to investigate both the claim and the claimant."

It is sufficient, therefore, if the notice or claim is not calculated to mislead, but contains such evidence of identity of place and person as to enable the investigating officials to make proper investigation when aided by reasonable inquiry. When, therefore, there is no evident intention to mislead, but a *bona fide* attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead. 5 Thompson, Negligence, § 6330; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Decker v. Seattle*, 80 Wash. 137, 141 Pac. 338; *Bane v. Seattle*, 80 Wash. 141, 141 Pac. 339. There was no evidence of any misleading on the part of the investigating officials. On the contrary, it appears that respondents had lived at 208, 21st avenue, for six years,

and were well known to the residents of 218, 21st avenue. Evidence in the record as to the proximity of 208 to 218 is found in the testimony of a lady living at 218, who said she knew Mrs. Wagner, and that "She lived in the Dows house." She was then asked, "Where is that?" To which she answered, "It is the neighbor's house." It is evident that the giving of respondents' address as 218, 21st avenue, was not misleading, and that any proper inquiry at such place would have disclosed the residence of respondents.

Complaint is also made that the lower court permitted the claim to be amended so as to include damages on the part of the husband "for loss of services, comfort and companionship of the wife." We find no attempt to prove any such element of damages, and, though the amendment was improper, the error was harmless.

The judgment will be affirmed conditional upon respondents' remitting therefrom the sum of $65, within twenty days after the going down of the remittitur. Otherwise a new trial is ordered. Costs in this court to appellant.

Crow, Main, Ellis, and Fullerton, JJ., concur.

[No. 12416. Department Two. March 5, 1915.]

THE STATE OF WASHINGTON, *on the Relation of State Board of Medical Examiners et al., Plaintiff*, v. C. W. CLAUSEN, *State Auditor, Respondent*.[1]

STATES—BOARD OF MEDICAL EXAMINERS — POWERS — EMPLOYMENT OF COUNSEL—"NECESSITY." The state board of medical examiners has no implied power to employ private counsel at the expense of the state, by reason of being charged with duties making such legal advice a necessity, when the law has made the attorney general or the prosecuting attorneys of the county the legal representatives of the board; since the term "necessity" in such case means a "legal necessity" and not an "actual necessity" by reason of the public attorneys refusing to perform their duties; hence allegations as to such refusal are immaterial.

SAME—BOARD OF MEDICAL EXAMINERS. Rem. & Bal. Code, § 8386 *et seq.*, as amended, being a complete act regulating the practice of medicine and the issuance of licenses therefor, and making certain violations of the act felonies or misdemeanors, and authorizing the state medical board to prosecute all persons guilty of violation of the act, but failing to expressly authorize the board to employ private counsel, and failing to provide any special punishments or procedure for prosecuting offenders, stands on the plane of the general criminal statutes as respects violations of the act and punishments therefor, and such duties therefore fall upon the prosecuting attorneys, and the state medical board has no authority to employ private counsel to perform such duties, notwithstanding that the board is authorized to "prosecute" offenders; nor can the board employ private counsel at the expense of the state for the purpose of securing legal advice, the constitution having made the attorney general the legal adviser of all state officers, which includes the members of such boards.

Application filed in the supreme court October 9, 1914, for a writ of mandamus to the state auditor to compel the issuance of a salary warrant for legal services rendered the state board of medical examiners. Denied.

George McKay and *Max Wardall*, for relators.

The Attorney General and *Edward W. Allen, Assistant*, for respondent.

[1]Reported in 146 Pac. 630.

FULLERTON, J.—This is an original application for a writ of mandamus. In the petition for the writ, it is alleged that one of the relators is the state board of medical examiners of the state of Washington, and the other "the regularly retained and employed attorney and legal adviser of said board;" that the respondent is the auditor of the state of Washington; that, on the 15th day of August, 1914, the board audited and allowed the account of the relator Wardall for his services as such attorney at the sum of $200, and issued to him a voucher therefor; that Wardall presented the voucher to the respondent and demanded a warrant on the state treasurer for the amount thereof, and that the respondent refused to issue the warrant on the ground that the medical board was without power to hire or employ private counsel at the expense of the state. It is further alleged that it is impossible for the board to properly discharge the duties imposed upon it by the statute creating it without the aid of legal counsel with whom it can at all times consult and who is conversant with the work of the board and the legal questions constantly arising out of such work, and that it has been the custom and practice of the board, since its creation by the statute of 1909, to employ and pay private counsel, as well as the practice of the medical boards, acting under like and similar statutes, existing prior to the enactment of the statute creating the present board.

The petition is accompanied with the affidavits of the president and secretary of the board. These set out in more detail the nature of the work of the board and the character of the matters coming before it for hearing and decision. In them the allegation is repeated that the work of the board cannot be successfully performed without the aid and assistance of counsel and the charge is made that this aid and assistance cannot be obtained, either from the office of the *Attorney General* or from the offices of the various prosecuting attorneys of the state. Indeed, in the affidavit of the president of the board, these officers are openly charged with neglect of

duty in this regard, and it is stated that "county attorneys will not look up evidence or prepare cases" against illegal practitioners of medicine, "and within the affiant's professional experience are not anxious to conduct these prosecutions;" and that "illegal practitioners may as well be permitted openly to practice if the board is compelled to look for results from the various county attorneys." The prayer of the petition is that a mandate issue directing the state auditor to issue the warrant demanded.

The auditor, in his return to the alternative writ, both answered and demurred to the petition. His answer consists of a denial of all of the allegations of the petition relative to the necessity of the board to employ private counsel, the allegations of inability, neglect, or refusal of the *Attorney General*, and the various prosecuting attorneys, to attend to the legal matters confronting the board. The demurrer suggests the question of the power of the medical board to employ private counsel for any purpose. Both sides request the court to send the case to a referee for the purpose of taking testimony, should it deem the determination of the truth of the disputed matters necessary to a proper disposition of the cause.

The cause is before us on the question raised by the demurrer. But before discussing this question, it is well to consider the effect of the allegations of the petition concerning the inability, neglect and refusal of the *Attorney General*, and the various prosecuting attorneys of the state, to attend upon and advise the board, and to prosecute violators of the provisions of the medical act. We cannot think these allegations material. They were inserted in the petition, no doubt, to show the necessity for the employment of private counsel. As will hereafter appear, there is no express provision in the act creating the medical board empowering it to employ private counsel. This power, if it exists at all, can only be inferred from the general powers conferred on the board; the power implied from the general grant of power to take such steps

as are reasonably necessary to the successful performance of the power conferred.

But conceding that the board may find it necessary in the performance of its imposed duties to have the advice and assistance, and is obligated by law to seek such advice and assistance from the *Attorney General* of the state, or from some one of the various prosecuting attorneys of the state, it cannot, merely because these officers are unable, or because they neglect or refuse to furnish it with such advice and assistance, employ private counsel for that purpose. The term "necessity" in such cases means "legal necessity" as distinguished from "actual necessity." In other words, if a person or board is charged by law with a specific duty, and the means by which the duty is to be accomplished are not specially provided for, the person or board so charged has the implied power to use such means as are reasonably necessary to the successful performance of the required duty, which in the present case might include the power to employ private counsel. But where a person or board is charged by law with a specific duty, and the means for its performance are appointed by law, there is no room for implied powers, and the means appointed must be followed, however inadequate may be the result. So, here, if the law has made the *Attorney General* and the several prosecuting attorneys of the state the legal representatives of the board of medical examiners, these are the only persons who can lawfully be paid for the work, no matter how indifferently they perform their duties. On the other hand, if these officers have not been constituted by law the legal representatives of the board, then the board may hire and pay with state funds such assistants in the way of legal counsel as it may find reasonably necessary to the performance of their duties. The disputed allegations of the petition, therefore, since they charge only neglect or omission of duty on the part of public officers, raise no issue material to the inquiry.

Passing to the principal question, we find that the board of medical examiners was created by the act of March 18, 1909.

Laws 1909, p. 677 (Rem. & Bal. Code, § 8386 *et seq.*). This act was complete in itself and superseded all of the then existing statutes on the same subject-matter. By its terms, the board is empowered to determine what persons shall be permitted to practice medicine and surgery, osteopathy, or "any other system or mode of treating the sick or afflicted" within the state of Washington. The board is authorized to issue licenses or certificates to those whom it determines are entitled to practice. An applicant for a certificate or license to practice any of the enumerated methods of treating the sick or injured may be refused such certificate or license if he has been guilty theretofore of unprofessional conduct, and any certificate or license duly issued may be revoked by the board for unprofessional conduct on the part of the holder. Before, however, a certificate or license may be refused an applicant, or before a certificate or license duly issued can be revoked, the applicant or holder of the certificate or license must be summoned before the board and given a hearing upon the charges preferred against him. From an adverse decision of the board, the applicant or the holder of the certificate or license is given the right of appeal to the superior court, and either party may appeal to the supreme court from an adverse decision by the superior court. Each holder of a license or certificate must record the same with the county auditor of the county in which he practices, and must exhibit it to any citizen of the state who requests to see the same; failure to do either of which constitutes a misdemeanor. It is made a felony, punishable as forgery is punished, for any person to file for record, or attempt to file for record, a certificate issued to another, falsely claiming himself to be the person therein named or the person entitled to the same, and it is a misdemeanor for any person to practice medicine or surgery, osteopathy, or the healing art in any of its forms, without having a duly issued, unrevoked certificate or license. The act also authorizes the collection of certain fees from applicants for licenses and certificates, and

formerly provided that such fees should be paid to the treasurer of the board "and used to defray the expenses and compensation of said board." This provision was, however, amended at the session of legislature in 1913 (Laws 1913, p. 256; 3 Rem. & Bal. Code, § 8393), and it is now provided that all money received by the board, or any member thereof, shall be paid to the state treasurer. The amendatory act also provides a compensation for the secretary and treasurer of the board, and a compensation for the several members thereof with their necessary expenses while in attendance upon the meetings of the board. It is also provided that "all such compensation and expenses, and all other expenses incident to the execution of this act shall be paid by the state treasurer upon warrants drawn by the state auditor upon the presentation of proper vouchers to be approved by the majority of said board, as in case of state officers;" and that "the said board is authorized to prosecute all persons guilty of a violation of the provisions of this act." The supplemental budget to the general appropriation act for the year 1913, carried an appropriation "for the expenses of" the board in the sum of $12,000.

From the foregoing epitome of the provisions of the acts relating to the medical board, it will be observed that nowhere in the act is the board expressly empowered to employ, at the expense of the state, private counsel to assist it in carrying out the provisions of the act. Nor can we discover anything in the language of the act from which it can be said that this power is impliedly given the board. It must follow, therefore, that, if the power exists at all, it arises from the necessities of the case; it arises because the services of counsel are necessary to enable the board to carry out the duties imposed upon it by the statute, and that such counsel is not otherwise provided for it by law. It is our opinion that the statute presents no such unusual conditions.

Turning again to the act, it is found that no special punishments are provided by it. Violations of certain of its pro-

visions are simply declared misdemeanors, and are, of course, punishable under the general statutes providing for the punishment of misdemeanors not otherwise prescribed. The felonies created by the act are punishable as felonies are punishable under the general statutes. Nor is any special method of prosecuting offenders against the provisions of the act provided for. These must, therefore, be prosecuted according to the provisions of the general laws; if before a justice of the peace, by a complaint charging the particular offense; if before the superior court, by an indictment or information. It is clear, therefore, that these statutes, with respect to the manner of their enforcement, stand on a plane with the general criminal statutes of the state. In fact, they form a part of the general criminal statutes of the state, and are to be enforced, in so far as court procedure is concerned, in the same manner and by the same officers as all such statutes are enforced. We need not cite the statutes to show that this duty is imposed upon the public law officers of the state. On the *Attorney General* in certain instances, and on the prosecuting attorneys of the several counties of the state in others, is imposed the duty of prosecuting offenders against the laws. The rights and powers of these officers in this respect are absolute in all cases where the statute has not specially granted the power to another, and, as we find no special grant of power to the medical board to employ special counsel to prosecute offenders against the act in question, we are forced to the conclusion that no such power exists.

Nor is the board without duly appointed legal advisers as to matters that pertain to the general administration of the statute. As to all matters connected with the prosecution of offenders, they have the right to consult with the prosecuting attorney of the county in which the offender must be prosecuted. As to the general administrative questions, the *Attorney General* is their legal adviser. By the constitution and by the statute, the *Attorney General* is made the legal adviser of all state officers. And while it may be true, as coun-

sel for the board argue, that the members of the medical board are not state officers under the strict definition of that phrase, it is true that they perform state functions and are state officers in the broader sense. We think the statute, in defining the duties of the *Attorney General*, used the term in the broader sense; that it intended to make that officer the official legal adviser of all persons and boards clothed with the duty of performing state functions, whether, technically speaking, they may or not be state officers.

But the act authorizes the board to prosecute all persons guilty of violating the provisions of the act, and it is said that this provision empowers them to employ private counsel for that purpose. We cannot, however, think it has that effect. The provision is not an uncommon one in statutes of like character. Like duties, within their respective jurisdictions, are imposed upon the labor commissioner, the state board of health, the state insurance commissioner, the game and fire wardens, and it is made the duty of school superintendents and directors, road supervisors, all sheriffs, constables and other peace officers, to make complaints of violation of certain laws, yet no one has heretofore supposed that these officers might employ private counsel at the expense of the state to aid them in the prosecution of their duties. The state has an interest in the selection of officers charged with the administration of its laws, and this interest is not to be deemed surrendered unless upon the clearest implication. As we said in *Ritchie v. State*, 42 Wash. 653, 85 Pac. 417: "A court is treading upon dangerous ground when it rests the authority of a public officer to bind the state on some unforeseen emergency or the law of necessity." See, also, *Young v. State*, 19 Wash. 634, 54 Pac. 36.

Our conclusion is that the state board of medical examiners is without power to employ, at the expense of the state, private counsel to assist them in the performance of their duties. The application for the writ of mandamus is therefore denied.

CROW, MOUNT, MAIN, and ELLIS, JJ., concur.

[No. 11709. Department One. March 5, 1915.]

JESSE PRINCE *et al.*, *Respondents*, v. GEORGE A. MOTTMAN *et al.*, *Appellants*.[1]

APPEAL—APPEALABLE ORDERS — VACATING JUDGMENT — FINALITY—PARTIES ENTITLED. The purchaser at a partition sale, who was not a party to the action, may appeal from an order vacating the judgment and setting aside the sale; as the order was, as to him, a final judgment, determining his rights in the matter.

GUARDIAN AND WARD—GUARDIAN AD LITEM—DUTIES—NEGLIGENCE—FAILURE TO MAKE DEFENSE. The evidence is insufficient to show negligence or bad faith of a guardian *ad litem* in defending an action for partition, where it appears that, in a second action between the same parties, he assumed and vigorously asserted a defense in line with the decision of the same court between the same parties which, if successful, would have resulted advantageously for his wards; and the fact that the first decision relied on by him was subsequently reversed on appeal, and that he did not appeal from an adverse decision in the second case, does not amount to misconduct or a failure to discharge his duties.

JUDICIAL SALES—VACATION—RIGHTS OF PURCHASERS—BONA FIDES. Under Rem. & Bal. Code, § 1742, providing that property acquired by a purchaser in good faith under a judgment subsequently reversed shall not be affected by such reversal, a partition sale to purchasers not parties to the action, who bought on the open market, will not be vacated because of irregularities or errors which resulted in the judgment, at the suit of minors who were parties to the action and represented by a guardian *ad litem*, who failed to appeal from or supersede the judgment.

JUDICIAL SALES—IRREGULARITIES—NOTICE—CONFIRMATION—EFFECT. After confirmation of a partition sale, the referee's report and order of confirmation showing a substantial compliance with the statute as to notice, objection cannot be made to the notice of sale in that the name of the newspaper and the day of the week on which the paper was published was not shown by the report, nor that the last day of publication was given as November 14th, when from the context of the report it appears that the same was a clerical error, intended for December 14th.

JUDICIAL SALES—VACATION — INADEQUACY OF PRICE — EVIDENCE—SUFFICIENCY. Such inadequacy of price as to avoid a partition sale is not shown where it appears that, four years previous to the sale,

[1]Reported in 146 Pac. 841.

the land had been appraised at $6,245, that it sold for $8,100 after a prior sale had been set aside, that the purchaser offered to surrender the property for the price bid, with reasonable interest, although witnesses testified that the property was worth $18,000 two years after the sale, there being no evidence of the value at the time of the sale.

Appeal from a judgment of the superior court for Thurston county, Rice, J., entered April 18, 1913, upon findings in favor of the plaintiffs, in an action to vacate a decree for the partition of real estate and to set aside a sale made thereunder, tried to the court. Affirmed in part and reversed in part.

John M. Wilson and *A. J. Falknor*, for appellants.

B. H. Rhodes and *Troy & Sturdevant*, for respondents.

Crow, J.—Jesse Prince and Harold Prince, minors, by their general guardian, Ernest F. Prince, instituted this proceeding in the superior court of Thurston county, by motion and petition, to vacate a decree for the partition of real estate and all subsequent proceedings thereunder. The original decree was entered on July 11, 1910, in cause No. 3943, wherein Rebecca A. Prince was plaintiff, and Jesse Prince and Harold Prince, minors, Frank C. Owings, their guardian *ad litem*, C. W. Maynard and others were defendants. By the terms of the decree, it was adjudged that the north half of the southeast quarter and the southwest quarter of the southeast quarter of section 4, and the north half of the north half of the northwest quarter of the northeast quarter of section 9, all in township 15, north of range 1, west, was the joint property of the plaintiff, Rebecca A. Prince, and the minor defendants, Jesse Prince and Harold Prince; that one-half thereof was held by the plaintiff in fee simple and one-fourth by each of the minor defendants, and that the property could not be partitioned without injury, but should be sold. The decree further adjudged that the southeast quarter of the southeast quarter of said section 4, and the north eighteen

acres of the northeast quarter of the northeast quarter of said section 9, was wholly the estate of the minor defendants, Jesse Prince and Harold Prince, as tenants in common, subject to a lien for $3,400 in favor of Rebecca A. Prince, the nature of which need not be now stated as it is not material to this appeal; that the lands last described were so situated that they were an integral part of the lands first described, and that they should also be sold for the purpose of paying the lien and avoiding loss to the parties. It was further ordered that, after sale of the lands, the proceeds be distributed in accordance with the terms of the decree. C. W. Maynard had been made a party as mortgagee, holding under a mortgage executed by the plaintiff Rebecca A. Prince. The amount due upon his mortgage was ascertained and ordered paid from the proceeds of the sale of the interest adjudged to Rebecca A. Prince. In pursuance of this decree, the lands, on December 17, 1910, were sold by a referee to George A. Mottman for $8,100. The sale was confirmed, and distribution of the proceeds was made, the sum of $1,457.82 being deposited in the registry of the court for the minor defendants as their ascertained interest. This sum has not been withdrawn.

The trial upon which this decree was rendered was had after a trial in the superior court of Thurston county of another and separate action, Prince v. Prince, which was later appealed to this court. The judgment in that case was reversed on August 11, 1911 (64 Wash. 552, 117 Pac. 255). Both causes arose in the same estate and under the will of Jonathan D. Prince, the deceased husband of Rebecca A. Prince, and father of Jesse Prince and Harold Prince. A full statement of the facts pertaining to the estate and the will of Jonathan D. Prince may be found in our opinion in *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255. In brief, it there appeared that Jonathan D. Prince and Rebecca A. Prince, his wife, in pursuance of an agreement between themselves, had executed identical wills; that the will of Jonathan D. Prince

was probated; that Rebecca A. Prince was qualified as executrix, and acted as such for several years; that she then endeavored to exercise an election to take under the law, and not under the will; that in pursuance of such election, she commenced actions in partition against her children, who were legatees under the will; that the trial court held she could make such election, and that its decree was reversed by this court. To avoid confusion in the further statement of this case, we will allude to the action considered in *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255, as the first partition action, and the action in which the decree was vacated in this proceeding as the second partition action.

By the eighth clause of his will, Jonathan D. Prince made the following devise:

"I hereby give, devise, and bequeath to my beloved wife Rebecca A. Prince all of the rest and residue of my property, both real, personal and mixed and wheresoever situate, lying and being, during the term of her natural life, and upon her death then the rest and residue thereof to descend to and vest in my sons Jesse Prince and Harold Prince share and share alike."

The lands in which a life estate was thus devised to Rebecca A. Prince, and which upon her death were to descend to Jesse Prince and Harold Prince, are the identical tracts described in the decree above mentioned, which were directed to be sold, and were sold by a referee to George A. Mottman. Rebecca A. Prince, claiming all these lands to have been the community property of herself and her deceased husband, and claiming the right to take under the law, had commenced the second action to partition the lands, and after trial the decree above mentioned was entered.

After our decision in the first action of *Prince v. Prince*, *supra*, the minor legatees, Jesse Prince and Harold Prince, by Ernest F. Prince, their general guardian, on April 29, 1912, by motion and petition, commenced this proceeding against Rebecca A. Prince, George A. Mottman and June

Mottman, his wife, to vacate the decree from which they had not appealed, and to set aside the sale that had been made to Mottman. In their petition they, in substance, alleged the execution of the identical wills by Jonathan D. Prince and Rebecca A. Prince, his wife, their agreement made at the date of the execution of the wills, the death of Jonathan D. Prince, the probate of his will, the appointment of Rebecca A. Prince as executrix, and other probate proceedings. They further alleged that, after Rebecca A. Prince had squandered the personal property and all the rents, issues, and profits of the real estate, she attempted to elect to take under the law, claiming an undivided one-half interest in the real estate devised to the minors, and commenced the second action of partition; that Frank C. Owings was appointed guardian *ad litem* for the minors; that he did not perform his duties faithfully as guardian *ad litem*, but that by his answer he substantially admitted the allegations of the complaint; that he virtually made no defense on behalf of the minors; that he appeared as attorney for C. W. Maynard, the mortgagee, whose interests were alleged to be adverse to those of the minors; that, by reason of his failure to properly defend on behalf of the minors, the court was induced to make findings and decree against their interests; that George A. Mottman purchased the land for $8,100; that no notice of sale was published by the referee, as required by law; that the sale was confirmed; that the litigation was so manipulated that only $1,457.82 was awarded to the minors; that they have not withdrawn that sum or any part thereof from the registry of the court; that the lands were actually worth $18,000, and that the interest of the minors, subject to the life estate devised to Rebecca A. Prince, was worth $10,500. Upon the trial of the application to vacate the decree, the court made findings in harmony with the allegations of this petition, and entered an order vacating the decree and setting aside the sale to George A. Mottman. From this order, the defendants George A. Mottman and June Mottman, his wife, have ap-

pealed. No appeal has been taken by or on behalf of the defendant Rebecca A. Prince, who, after service of process, failed to appear in the proceeding to vacate the decree.

The respondents have interposed a motion to dismiss the appeal, for the reason that it is based upon an order vacating a judgment and directing a new trial of the case in which the judgment was entered. In support of this motion, they contend that this court has uniformly held that an order vacating a judgment is not appealable, as such vacation leaves the action for further proceedings. That orders vacating judgments, as a rule, are not appealable may be conceded, but there are exceptions to the general rule. The record shows that George A. Mottman was not a party to the second partition action, and that he became a purchaser after and in pursuance of the decree. If the judgment is vacated and the sale is annulled, the order as to him becomes a final adjudication. If he cannot now appeal, he can have no relief whatever, as he is not a party to the original action and cannot participate in a trial thereof. The issues to be re-tried are between Rebecca A. Prince and the respondents Jesse Prince and Harold Prince. The rule announced in *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164, is applicable here. It was there held that an order vacating a tax foreclosure judgment, a tax sale and tax deed, could be appealed by a purchaser at the tax sale, who had not been a party to the original suit. We there said:

"The appellant was brought into this proceeding but has no interest in or control over the original action. The right which it now asserts cannot be asserted in the tax case nor on appeal from the tax judgment. While the proceeding is in name a motion to vacate a tax judgment, so far as the appellant is concerned it is in substance and effect a proceeding to set aside a tax sale and tax deed. Had such relief been sought in an independent action, there is no doubt that a right of appeal would exist, and the appellant should not be deprived of that right because its title was adjudicated under the guise of a motion interposed after judgment in an action to which

it was not originally a party. For these reasons the order is, in effect, final as to the appellant, and is therefore appealable."

The motion to dismiss is denied.

Respondents' principal contentions in support of their motion and petition to vacate the decree were, that the guardian *ad litem* had failed to properly discharge his duties; that he had been guilty of collusion with other parties to the action; that the referee had not properly advertised the sale; and that the real estate sold for an inadequate price.

It must be remembered that the vacated decree was rendered upon a trial which was had after the trial in the superior court of the first case of *Prince v. Prince, supra.* Both trials were before the same superior court judge. On the trial of the second action, the evidence introduced on the trial of the first action was, by stipulation, admitted as evidence. Other evidence was also admitted. The record in this proceeding shows that, on the trial of the second action, the guardian *ad litem* claimed and asserted that the first tract described in the vacated decree was community property, and that his minor wards were entitled to one-half thereof. It further shows that he also contended that the second tract described in the vacated decree was the separate property of Jonathan D. Prince; that he vigorously resisted the lien claimed by Rebecca A. Prince; that he insisted that, as Rebecca A. Prince had elected to take under the law and not under the will, and the separate property had been devised to his minor wards, they were entitled, in view of her election, to a present fee simple estate in and to the entire tract. These contentions were made in good faith in the light of the holding of the trial judge, made in the first action, to the effect that Rebecca A. Prince was entitled to her election to take under the law. That ruling, although subsequently held to be erroneous in *Prince v. Prince, supra,* at the time of the trial of the second action was presumed to be correct. Having this decision of the trial judge in mind, we fail to see

how the guardian *ad litem* can be charged with a failure to discharge his duties. In fact, the position he then took, had it been successful, would have resulted in securing to the minors an immediate present estate of considerable value, and possibly a greater value than that for which they now contend. It would serve no good purpose to state the evidence introduced on the hearing of the petition to vacate the decree. We have read it at length, with the result that we are satisfied the guardian *ad litem*, in the light of the facts as they then existed and as they have been stated, acted in good faith and for the best interests of his wards as he was then advised. He took no appeal from the final decree, but that omission does not amount to misconduct or a failure to discharge his duty. While it may now be conceded, in view of our decision in *Prince v. Prince, supra*, that the vacated decree was erroneous, it does not follow that it was fraudulently obtained, or that, in the absence of an appeal, it should now be vacated. We are unable to find any bad faith, collusion, or misconduct on the part of the guardian *ad litem*.

As George A. Mottman and June Mottman, his wife, are the only persons who are prosecuting this appeal, we find it unnecessary to consider further the question whether the decree was erroneous or should for any reason be vacated as to the defendant Rebecca A. Prince, we having concluded that, in any event, the appellants Mottman and wife are entitled to be protected in their purchase of the land. Rem. & Bal. Code, § 1742 (P. C. 81 § 1237), provides that:

"If by a decision of the supreme court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the supreme court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof. But property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal."

Had the guardian *ad litem* prosecuted an appeal to this court from the final decree, and had a reversal been obtained, yet, under the provisions of this section, the appellants Mottman and wife would be entitled to protection in and to the property they had purchased. They were not parties to the second partition action. They took no part in any trial or proceedings that resulted in the final decree and order of sale. They bought in the open market, at a public sale made in pursuance of a judicial decree, which was fair, regular, and valid on its face, which disclosed no errors, and which had been rendered in an action in which the court by proper process had obtained jurisdiction of all the parties, and also had jurisdiction of the subject-matter. It is the policy of the law to protect third parties who, in good faith and for value, become purchasers at judicial sales, so that the highest and best price may be obtained at such sales. Section 1742, *supra*, which is the declaration of a rule generally recognized and announced by courts of justice, was considered by this court in *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896. It was there held that an execution plaintiff is not a purchaser in good faith in the sense that he will be entitled to retain property purchased by him under a judgment subsequently reversed, but that his title will be divested by a reversal, and the parties to the litigation will be restored to the same position in which they were prior to the rendition of the judgment. George A. Mottman was not a party to the original action or litigation herein. On the contrary, he was a purchaser in good faith. In *Singly v. Warren*, *supra*, this court clearly recognized the right of such a purchaser, in the following language:

"But, that a stranger to the record, who, in good faith, purchases land at an execution or judicial sale under a valid judgment, which has not been superseded by the filing of a proper bond, acquires rights which are not affected by a subsequent reversal of the judgment, is a doctrine universally announced by the courts. This rule has been recognized from very early times, and the reason of it is, as stated in *Manning's Case*, 8

Coke, 192, and many subsequent cases, that if the title obtained by the purchaser in such cases were avoided, the vendee would lose both his property and his money, and great inconvenience would therefore follow, as no one would buy of the sheriff in such cases, and execution of judgments would not be done. *Corwith v. State Bank*, 15 Wis. 289. See, also, *Woodcock v. Bennet*, 1 Cow. 734 (13 Am. Dec. 568). Our law, like the law elsewhere, permits judgments and decrees to be enforced during the pendency of appeals unless a bond to stay proceedings is given as required by law, and the courts have always construed the law so as to inspire confidence in judicial and execution sales by protecting *bona fide* purchasers at such sales from loss or injury by reason of erroneous judgments or decrees. It would be unjust to require such purchasers to suffer loss on account of errors of the trial courts of which they had no knowledge, and which they were nowise instrumental in producing. And such a requirement would be contrary to the settled policy of the law to encourage bidding at judicial sales, and to prevent the property of debtors from being sacrificed thereat. Freeman, Judgments (4th ed.), § 484; *Marks v. Cowles*, 61 Ala. 299."

Had the guardian *ad litem* appealed from the decree and had a reversal been obtained after the sale to George A. Mottman, such a reversal would not have affected his title as a *bona fide* purchaser. This being true, we fail to understand how, after the time for an appeal has expired, the respondents who were served with process, and who as minors were represented by their guardian *ad litem*, can now have the right to vacate and annul the sale to Mr. Mottman because of any irregularities or errors which resulted in the final decree which the trial court had jurisdiction to enter. Had the land been purchased by Rebecca A. Prince, a party to the action, a different question, which we need not now consider, would be presented. The rule announced in the above quotation from *Singly v. Warren* is well sustained by cases cited in our opinion and by the overwhelming weight of authority. The same rule prevails when a decree has been entered against minors properly served and represented by a guardian *ad*

litem. Section 8, chapter 132, of the 1906 Code of the state of West Virginia, reads as follows:

"If a sale of property be made under a decree or order of court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled."

In *Chapman v. Branch*, 72 W. Va. 54, 78 S. E. 235, a case similar in many particulars to the instant case and involving identical questions, the supreme court of appeals of West Virginia said:

"We think it settled law in this state, that the title of an immediate purchaser, and of remote purchasers, not parties under a judicial decree, cannot be disturbed or affected by reversal on appeal, or on setting aside of a decree of sale for mere error therein, not going to the jurisdiction of the court, and that Smith and those holding under him are now protected by section 8, chapter 132, Code 1906. *Sinnett v. Cralle's Adm'r*, 4 W. Va. 600; *Martin v. Smith*, 25 W. Va. 579, 586; *Dunfee v. Childs*, 45 W. Va. 165; *Stewart v. Tennant*, 52 W. Va. 560, 7 Syl.; *Perkins v. Pfalzgraff*, 60 W. Va. 121; *Hansford v. Tate*, 61 W. Va. 207. The reasons for this rule and the legal principles underlying it are sufficiently covered by the opinions in the cases cited, and particularly in the cases of *Dunfee v. Childs* and *Perkins v. Pfalzgraff*, *supra*, and we need not reiterate them. These cases or some of them apply this rule to infants as well as adults proceeding by *prochein ami* before majority, as they may, *Poling v. Poling*, 61 W. Va. 78; *Seymour v. Alkire*, 47 W. Va. 302, 305, and cases cited, or in proper person after disability removed either under section 7, chapter 132, Code, or by motion, original bill or bill of review to set aside such decree of sale."

In *Denk v. Fiel*, 249 Ill. 424, 94 N. E. 672, the distinction between the rights of a purchaser at a judicial sale not a party to the action, and a purchaser who was a party to the action, is clearly defined. Referring first to the rights of a purchaser not a party to the action, the court, at page 430, said:

"It is a rule founded on reason and well supported by authority, that a purchaser at a judicial sale who is not a party to the record will be protected against any errors or irregularities in the proceeding anterior to the sale, provided that the court rendering such decree had jurisdiction. Innocent third parties have a right to rely upon a judgment or decree of a court having jurisdiction to pronounce it. They are not required to look beyond the question of jurisdiction, and if the decree is one which the court has jurisdiction to render, both as to subject matter and the parties, innocent purchasers acting in good faith will be protected notwithstanding the existence of errors which would cause a reversal of such decree or judgment by the court of review. *Montanye v. Wallahan*, 84 Ill. 355; *Thompson v. Frew*, 107 id. 478; *Crawford v. Thomson*, 161 id. 161; *Ure v. Ure*, 223 id. 454."

Later in its opinion, referring to the rights of parties to the action who became purchasers and who held in their hands the subject-matter of the original decree, the court, at page 431, further says:

"When the subject matter of the original decree is in the hands of persons who were parties or in privity with the parties to the original proceeding, a bill may be filed by infants for the purpose of setting aside such decree or judgment for fraud or for any error which appears upon the face of the record for which such decree or judgment would be reversed by a court of review. The reason for this distinction is that the party to a suit is presumed to know of all the errors in the record, and cannot acquire any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal or annulment of such decree. All titles acquired by parties to an erroneous record are held subject to be divested when such erroneous judgment is reversed or set aside. *McJilton v. Love*, 13 Ill. 486; *Chickering v. Failes*, 29 id. 294; *Cable v. Ellis*, 120 id. 136; *Aurora and Geneva Railway Co. v. Harvey*, 178 id. 477; *Ure v. Ure, supra;* Freeman on Judgments, sec. 4, p. 81."

The distinction thus announced is clear. Mr. Mottman was not a party to the action in which the decree was entered. He purchased in good faith relying upon the decree when in full force and effect, and under the statute and the well

established doctrine announced by this and other courts, should be protected in the title which he obtained. *Marquis v. Davis*, 113 Ind. 219, 15 N. E. 251; *Rhea v. Shields*, 103 Va. 305, 49 S. E. 70; *Livingston v. Noe*, 69 Tenn. 55; *Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 372.

In *Gray v. Brignardello*, 1 Wall. 627, the court said:

"It is a well-settled principle of law, that the decree or judgment of a court, which has jurisdiction of the person and subject-matter, is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication when made, concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet, all rights acquired at a judicial sale, while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know, that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been deemed necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar."

Respondents further contended that the referee did not give proper notice of the sale. In his report the referee says:

"That on the said 14th day of November, 1910, I not only posted the said notice attached at the said court house door, but I also posted an exact copy thereof at the door of the city hall of the city of Olympia, and at the corner of Third and Main streets in the city of Olympia, Thurston county, state of Washington, said three places being three of the most prominent places in said county, and moreover I did post a copy of said notice on the lands to be sold in a conspicuous place at the main gate entering said lands. That I moreover caused a copy of said notice to be published in the ....., a newspaper published weekly in the town of Tenino in said Thurston county and of general circulation throughout the said Thurston county, and state of Washington, and the newspaper nearest said land and which newspaper is published on ..... each and every week,

and that said notice was published in said newspaper from its issue of the ..... day of November, 1910, for four consecutive weeks and five publications prior to the 14th day of November, 1910, all of which more fully appears from the affidavit of publication of the publisher of said newspaper hereunto attached and made a part of this return."

The affidavit of the publisher, of which mention is made, does not appear in the record now before us. The sale was made on December 19, 1910. An order of confirmation, made and entered on January 19, 1911, found and recited that the sale was had after notice posted and published as by law required. This record shows not only that the notice was posted, but that it was published for four consecutive weeks in five issues, in a weekly newspaper published and of general circulation in Thurston county, Washington. It seems apparent that the use of the words "14th day of November, 1910," in the return of the referee was a clerical error, and that the words "14th day of *December*" were intended. Rem. & Bal. Code, § 864 (P. C. 81 § 1503), provides that all sales of real property made by referees shall be made in the manner required for the sale of real property on execution. Rem. & Bal. Code, § 582 (P. C. 81 § 925), pertaining to execution sales, provides that, before an execution sale of real estate, notice thereof shall be given, by posting a notice particularly describing the property, for a period of not less than four weeks prior to the date of sale in three public places of the county, one of which shall be at the courthouse door where the property is to be sold; and publishing a copy thereof once a week, consecutively, for the same period, in a newspaper of general circulation published in the county. The return of the referee and the order of confirmation show a substantial compliance with this statute, although neither the name of the newspaper nor the day of the week on which the paper was issued was stated. Whether this was an irregularity of which advantage could be taken prior to the confirmation, we need not now decide, for in any event it was

cured by the order of confirmation. *Parker v. Dacres*, 1 Wash. 190, 24 Pac. 192; *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018; *Johnson v. Bartlett*, 50 Wash. 114, 96 Pac. 833.

Respondents further contended that the land, although worth $18,000, was sold for $8,100. To sustain this contention they rely on the evidence of witnesses who testified to the value of the land two years after the sale. The record shows that the first sale made by the referee was set aside at the instance of the guardian *ad litem*. This same land was appraised on June 28, 1906, at $6,245, by the appraisers of the estate of Jonathan D. Prince, deceased. It was sold to Mottman on December 17, 1910, for $8,100. In December, 1912, respondents' witnesses testified that its maximum value was then $20,000. No evidence was given as to its value at the date of the sale to Mottman. The record shows that the appellant George A. Mottman offered to convey the land to respondents for the price he had paid with a moderate rate of interest added, and that the offer was made to avoid this litigation. In *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22, property of the alleged value of $1,700 was sold on execution for $195.50, and it was there contended that the sale should be vacated for inadequacy of price. Passing upon this contention, the late Chief Justice Dunbar said:

"The testimony on the part of the respondent was that the property was worth from $1,700 to $1,800; on the part of the witnesses for the appellant, that it was worth about $1,000, the appellant himself, at the time of the trial, offering to take $1,000 for it. But while the amount bid was disproportionate, it is the general rule that inadequacy of price alone will not justify the setting aside of a judgment sale unless the disparity is so gross as to shock the conscience, and particularly where the estate is sold at public auction on legal notice and where no fiduciary relation exists."

Under the circumstances disclosed by the evidence, we cannot find such an inadequacy of price as will avoid the sale after confirmation and at this time.

We conclude that the trial court erred in vacating the sale. No appeal has been prosecuted by Rebecca A. Prince. As to her, the judgment vacating the decree will be permitted to stand, so that respondents may take such further legal steps as they deem proper in this or any other action to protect their rights in and to the proceeds of the referee's sale. As to the appellants Mottman and wife, the order vacating the sale will be reversed, with directions to the trial court to enter an order protecting their title under the provisions of Rem. & Bal. Code, § 1742 (P. C. 81 § 1237). The appellants will recover their costs on this appeal.

MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 12655. *En Banc.* March 6, 1915.]

THE STATE OF WASHINGTON, *on the Relation of J. W. Brislawn et al., Plaintiff*, v. EDWARD MEATH *et al., Respondents.*[1]

CONSTITUTIONAL LAW — LEGISLATIVE POWERS — INFRINGEMENT BY COURTS—ACTS—TIME OF TAKING EFFECT—DETERMINATION OF EMERGENCY. The legislative declaration that an act is necessary for the immediate preservation of the public peace, health or safety, or support of the state government and its existing institutions, and shall take effect immediately, thereby cutting off the people's right of referendum, is subject to review by the courts, and will be held unconstitutional where the law, on its face, shows that the declaration is false, although, if the act be doubtful, the question of emergency will be treated as a legislative question and the act upheld; in view of the initiative and referendum amendment to the constitution (Laws 1911, p. 136), providing that the people reserve to themselves the power to propose and enact laws, independent of the legislature, and to approve or reject, by the power of referendum, any act passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety or support of the state government and its existing institutions, which amendment repeals Const., art 2, § 31, providing that no law except appropriation bills shall take effect until ninety days after adjournment, unless in case of emergency, which emer-

[1]Reported in 147 Pac. 11.

gency shall be expressed in the act, and provides in lieu thereof that no law subject to referendum shall take effect until ninety days after adjournment (the time within which the referendum may be invoked); taking into consideration the old law, the mischief, and the remedy, and the fact that the constitution leaves no room for the exercise of discretion by the legislature in the given cases.

STATUTES—TIME OF TAKING EFFECT—EMERGENCY CLAUSE. Laws 1915, p. 19, § 1, amending Rem. & Bal. Code, § 6605, relating to the personnel of the board of state land commissioners, and substituting for the appointive state tax commissioners and fire warden, the elective secretary of state and state treasurer, is not an act that is necessary for the immediate preservation of the public peace, safety or the support of state government, within the initiative and referendum amendment to the state constitution providing that such laws are not subject to the referendum; hence § 2 of the act, declaring such fact and providing that the act shall take effect immediately is unconstitutional.

STATUTES—CONSTRUCTION. While previous constructions of constitutional provisions, adopted from another state, are persuasive, they are not conclusive when not sustained by reason or when based on a misconception of the law.

STATUTES—CONSTRUCTION. While a wrongful practice, if long continued, may result in a procedure, it cannot, however long continued, operate to repeal or nullify a constitutional mandate.

MORRIS, C. J., MOUNT, FULLERTON, and CROW, JJ., dissenting.

Application filed in the supreme court February 23, 1915, for a writ of *quo warranto* to determine the right to office as members of the board of state land commissioners. Granted.

Troy & Sturdevant, for relators.

The Attorney General, for respondents.

CHADWICK, J.—At the first session of the state legislature, 1889-90, several boards were created to administer the public lands of the state. In 1893, the several acts were amended so that an independent board with full jurisdiction over state lands was provided for. The board consisted of the commissioner of public lands, ex-officio member and chairman of the board, and three members, to be appointed by the governor. Laws of 1893, p. 386. The act of 1893 was amended in 1895. The commissioner of public lands was

made a member of the board with two others to be appointed by the governor. Laws of 1895, p. 528. In 1897, the act was again amended. The board was made to consist of elective state officers, the commissioner of public lands, secretary of state, and superintendent of public instruction. Laws of 1897, p. 229. In 1907, the act was again amended. The board was made to consist of the commissioner of public lands, state fire warden and forester, and the state board of tax commissioners. Laws of 1907, p. 290. This personnel was maintained in the amendatory act of 1909. Laws 1909, p. 757. The law defining the board of state land commissioners has been carried into Rem. & Bal. Code, as § 6605 (P. C. 477 § 13). At its present session, the legislature passed an act amending § 6605, Rem. & Bal. Code:

"Section 1. . . . The commissioner of public lands, the secretary of state and the state treasurer shall constitute the board of state land commissioners and shall have all powers and perform all duties with reference to the selection, appraisement and sale or lease of school, granted or other lands, except capitol building lands, the establishment of harbor lines and lease of harbor area which are now or may hereafter be vested in or required of the board of state land commissioners, the board of appraisers or the harbor line commission. And said board of state land commissioners shall be and serve as the commission and the board of appraisers mentioned in section one of article fifteen and section two of article sixteen of the state constitution.

"Section 2. This act is necessary for the immediate preservation of the public peace and safety and the support of the state government, and shall take effect immediately." Laws 1915, ch. 6, p. 19.

It will be seen that, for the state fire warden and forester and the board of state tax commissioners, the secretary of state and state treasurer are substituted.

Section two of the act, the emergency clause, was vetoed by the governor. The bill was passed over the governor's veto. A new board was immediately organized, consisting of the three state officers mentioned in the act. It has assumed

the function of administering the public lands of the state to the exclusion of the relators, the state tax commissioners and fire warden. These officers bring this proceeding in *quo warranto*, praying that the right of respondents be inquired into and that they be ousted and enjoined from further intruding themselves in the office.

There is but one question to be decided. Whether the legislature can declare an emergency in the instant case so as to free the act of the restraints contained in the recent amendment to the constitution known as the initiative and referendum amendment.

When the people adopted the constitution in 1889, it contained a provision:

"No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of any emergency (which emergency must be expressed in the preamble or in the body of the act) the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house; said vote to be taken by yeas and nays and entered on the journals." Const., art. 2, § 31.

This clause, in one form or another, is common to most of the states. The *Attorney General* states the broad premise that a court will not, under any circumstances, review the discretion of the legislative body, and that a legislative declaration of an emergency has always been regarded as not open to judicial inquiry. He cites several cases, but inasmuch as they are taken from Cyc., which we cite below, we will not encumber this opinion by setting them out.

Where there is a declaration in the constitution that no law shall take effect unless in a case of emergency to be declared by the legislature, it may be truthfully said that the general rule is that a court will not review the declaration of the legislature; but where the people have put upon the legislature a limitation in the way of a specific definition of its power and an elimination of acts of a certain character,

the rule is that the declaration of an emergency must conform to the constitutional requirement.

"In those jurisdictions in which, under the general rule, statutes do not take effect until some time subsequent to their passage and approval, it is commonly provided that when an emergency exists the legislature may declare a statute in force from its passage. Under such provisions the legislature is the sole judge as to whether an emergency exists, and its declaration is not open to question by the courts. Where, however, such special provisions, permitting the legislature to except certain statutes from the general rule, are found in the constitution, the legislative declaration that an emergency exists must conform to the constitutional requirements, and must be clear, distinct, and unequivocal." 36 Cyc. 1193, 1194.

See, also, Cooley, Constitutional Limitations (7th ed.), 76.

At the general election held in November, 1912, the people of the state adopted the initiative and referendum amendment to the constitution. By this amendment, it was provided that no law or bill subject to the referendum shall take effect until ninety days after the adjournment of the legislature at which it was enacted, and that all laws shall be subject to referendum except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions.

We shall assume, for it is not seriously contended that it is not so, indeed, it could not be so contended, that in truth and in fact the amendment to § 6605, which does no more than to remove from the board one man or set of men and replace them with other men, is not in fact "necessary for the immediate preservation of the public peace, health or safety" of the state.

It is the contention of the respondents that the provision for an emergency in the amendment is in no respect different from that contained in Const., art. 2, § 31, and that the courts are powerless to inquire into the act or discretion of the legislature; that we are governed by the same rules and by the

same considerations which have moved the courts since the establishment of our government to put no judicial restraints upon legislative discretion.

The contentions of the respondents have seemingly—we say seemingly for it is not entirely so—been upheld by the courts in Oregon, South Dakota and Arkansas. *Kadderly v. Portland*, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; *Dallas v. Hallock*, 44 Ore. 246, 75 Pac. 204; *Bennett Trust Co. v. Sengstacken*, 58 Ore. 333, 113 Pac. 863; *Sears v. Multnomah County*, 49 Ore. 42, 88 Pac. 522; *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605; *Arkansas Tax Commission v. Moore*, 103 Ark. 48, 145 S. W. 199. While the supreme court of Michigan and the court of appeals in California have held, under a provision the same as ours, that there *may* be a judicial question to be reviewed by the courts. *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145; *Attorney General ex rel. Barbour v. Lindsay*, 178 Mich. 524, 145 Pac. 98. Oklahoma has held both ways: *Oklahoma City v. Shields*, 22 Okl. 265, 100 Pac. 559; *In re Menefee*, 22 Okl. 365, 97 Pac. 1014; *Riley v. Carico*, 27 Okl. 33, 110 Pac. 738.

There has been a wide inconsistency in the holding of the courts upon constitutional questions. They have declared that, where the legislature has said there is an emergency, although undefined, its declaration is final and conclusive upon all. At the same time, and in the same day, they have not hesitated to declare acts of the legislature to be in derogation of the fundamental law or some of the legislative limitations of the constitution.

The judicial aversion to a review of legislative discretion, in so far as it relates to emergency clauses, is no more thoroughly established than the equivalent declaration that courts have power to declare laws unconstitutional. Now there is no more reason for saying that a bill is an emergent measure, when upon its face it is not, and from the very nature of its subject-matter cannot be, just because the legis-

lature has said it is so, than there is for declaring a law to be unconstitutional when it has been passed by the legislature with the constitution and its limitations lying open before it. The sense and discretion of the legislature, as well as its power to discriminate between an act falling clearly without and one falling clearly within the constitution, should, if we are consistent, be given the same weight as a declaration that an act is emergent, but few courts have so held since *Marbury v. Madison*, 1 Cranch (U. S.) 49, although their inconsistencies have long been apparent to the lay mind. In the one case we have said that we will inquire, in the other we have said that we will not inquire, saying meanwhile that we will indulge every presumption in favor of a law and will not declare it unconstitutional unless it is clearly violative of the constitution.

In passing upon all questions involving a construction of statutes and constitutional declarations and limitations, there is no better test than to consider the old law, the mischief and the remedy. It was a favorite premise of those venerable sages who have digested the common law and preserved it in authoritative writings. It is still the vital principle in every inquiry into the legality or constitutionality of a statute, for,

"The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law." 1 Blackstone, Commentaries, p. 59.

It will be borne in mind that the whole scope, purpose and intent of § 31, art. 2, is most materially changed in the amendment. Section 31 says:

"No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of any emergency (which emer-

gency must be expressed in the preamble or in the body of the act) the legislature shall otherwise direct . . ."

While paragraph "c" of § 1, art. 2, of the seventh amendment to the constitution, providing for the initiative and referendum, is as follows:

"No act, law, or bill *subject to referendum* shall take effect until ninety days after the adjournment of the session at which it was enacted."

This provision must be read in the light of the whole amendment and the intention of the people as it is gathered from their approving vote. The object of the amendment, in so far as it touches the taking effect of bills or laws, was to secure the right of review. In paragraph "b" of the same section it is provided:

"The second power reserved by the people is the referendum, and it may be ordered on *any* act, bill, law, or *any part* thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."

If specific reservation in words of the right to subject *all* laws to the referendum were not enough, the preamble of the amendment makes it clear that the people intended to assert that the revised and amended clause of the constitution permitting emergent legislation should not be a dead letter, as was § 31 which was expressly repealed. They said:

"The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, *at their own option*, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature." Laws of 1911, p. 136.

At the time § 31 was written in our constitution, it had already been declared by other courts to be a still-born child,

a voice dying in the utterance of a command; putting no restraint upon the legislature and being beyond the range of judicial interference. It was, in legal effect and under judicial construction, as barren as if no words had been written after the section number. With this fact and this rule of construction before them, may we not ask why the people, upon second opportunity to speak to the subject, so radically changed the form of § 31? They must have had in mind the inconsistent declarations of the courts which we have noticed, as well as the fact that the legislature had habitually ignored the spirit of § 31. They desired and intended to mark a line between laws that might be emergent and those which clearly were not. Otherwise they would not have changed the words at all, but would have left it as the minority say they did, a dead letter, by readopting the words of § 31, or by allowing it to stand unrepealed. They did change the words, and in so doing marked the boundary between emergent laws and non-emergent laws, not upon lines or theories of legislation, but over a well blazed trail of legal construction. They fixed a limit beyond which the legislature cannot go without doing violence to the will and voice of the people. It is that current in the judicial stream marked by certain phases of the police power, and the support of the state government and its existing institutions. Of the police power, it is said:

"In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. It is not meant here to be asserted that this power is above the constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the state, and is not in violation of any direct and positive mandate of the constitution." *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

So in this case we have, for the first time in the history of this state, a positive recognition of the police power in

the constitution itself. The difficulty experienced by the courts in applying this doctrine and the great and growing variance of definition, and of which Chief Justice Shaw, whose definition is most favored, said, "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise" (*Commonwealth v. Alger*, 7 Cush. 53, 85), has come from the natural hesitation of legislative bodies to enter new fields of legislation under a general welfare clause, and the disinclination of courts to give judicial sanction to laws limiting or creating rights not recognized as proper subjects of legislation or judicial interference at common law.

But here there can be no doubt of the limitation put upon the power of the legislature to declare emergencies, or of the courts to sustain them. In the new enactment, they have not only fixed the limit but have restricted it to the primary elements of the police power, the "health, peace and safety" of the state. It was done deliberately. The people said to the legislature, make such laws as you will, but you may not legislate so as to take away our right to pass upon the law you have just enacted, "except such laws as may be necessary for the immediate preservation of the peace, health or safety, support of the state government and its existing institutions." It is certain ground, for men will not usually differ in opinion where the immediate preservation of the peace, health or safety of the state is at stake. To hold that the old rule of construction applies, is to write this reservation out of the constitution.

In the case of *Kadderly v. Portland*, 44 Ore. 118, 147, 74 Pac. 710, 75 Pac. 222, which is the leading case upon the other side (it is indeed the only case, as all others holding in the same way are lined upon it), this phase of the case is discussed and concluded in the way following:

"The constitution of Oregon, article IV, § 28, giving the legislative assembly power to put any law into force upon approval by declaring an emergency, has been modified by

the amendment of 1902, so as to exclude from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety. So far, all are agreed. But the vital question is, what tribunal is to determine whether a law does or does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? The inquiry is much simplified by bearing in mind that the exception in the constitutional amendment is not confined to such laws as the legislative assembly may legally enact by virtue of the police powers of the state, or to those alone that may affect the public peace, health, or safety. The police power is limited to the imposition of restraints and burdens on persons and property, in order to secure the general comfort, health, and prosperity of the state: Tiedeman, Lim. Pol. Power, § 1. But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health, or safety, whether they impose restraints on persons and property, or come strictly within the police powers, or not. The laws excepted from the operation of the amendment do not depend alone upon their character, but upon the necessity for their enactment in order to accomplish certain purposes. As to such laws, the amendment of 1902 does not in any way abridge or restrict the power of the legislature, which, by the insertion of a proper emergency clause, may unquestionably cause them to go into effect upon approval by the governor. As the legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare what shall be deemed laws of the character indicated, who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety."

We hesitate to match opinion with one so learned in the law as the writer of this opinion, but conscience impels a different conclusion. His argument is fallacious and unsound. Under the old form, the legislature was acting under a free license

to legislate. The people had reserved no right of review. Its act implied discretion, and courts had very properly held that one coordinate branch of the government will not review the discretion of another. There was no review or appeal from an expression of that discretion, however violently it wrenched the moorings of constitutional restraint. The declaration of an emergency was final and conclusive. But here no such declaration is final, and should be given no immediate effect unless it can be fairly said that the act is necessary to preserve the health, peace or safety of the state or to support the government or its institutions.

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty to look to the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been adopted to promote the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." *Mugler v. Kansas*, 123 U. S. 623, 661.

The reservation in the amendment is a declaration of "thou shalt not," except it be for the safety or support of the state. Broadly stated, the police power of the state is the state's law of self-defense, in respect to both persons and property. *Carstens v. DeSellem*, 82 Wash. 643, 144 Pac. 934.

The learned justice who wrote the opinion in the *Kadderly* case is in error when he says the obvious answer to the question,

"What remedy will the people have if the legislature, either intentionally or through mistake, declares falsely or erroneously that a given law is necessary for the purposes stated?" is "that the power has been vested in that body, and its decision can no more be questioned or reviewed than the decision

of the highest court in a case over which it has jurisdiction." *Kadderly v. Portland, supra*, p. 150.

On the contrary, power has been withheld, in so far as a withholding can be made by apt and certain words. It follows, then, that it is a question of power rather than of discretion. The limitation of that power must be found in the terms of the constitution, construed in connection with the intent of the people in incorporating such a provision in the constitution. *Attorney General ex rel. Barbour v. Lindsay*, 178 Mich. 524, 145 Pac. 98.

We think it will not be denied that a case might be postulated where the courts would say that the discretion of the legislature has been abused. *Riley v. Carico, supra.*

If this be so, the case at bar is such a case. Suppose, for instance, that the legislature had amended the law so as to reduce the legal rate of interest; legalize a bond issue once declared to be invalid; or, create a legal holiday, and declare an emergency, would any one say that the act should take effect immediately because the health, peace, or safety of the state demanded it? Surely no one would have the hardihood to argue that it was not a deliberate withholding of the right of referendum. Our thought is evidenced in the case of *Oklahoma City v. Shields*, 22 Okl. 265, 305, 100 Pac. 559. In that case the court said, after some discussion and quotation from the *Kadderly* case,

"We conclude that the judgment of the legislature in determining whether or not an emergency existed—that is, whether or not a measure is immediately necessary for the preservation of the public peace, health, or safety—rests solely with the legislature. It is not subject to review by the courts, or any other authority except the people. Under the reserved power of the initiative and referendum, after the declaration of an emergency when not referred to the people for their judgment in such measure it still remains with the people, if they are dissatisfied with a measure, by an initiative petition to cause the same to be submitted to the people at the next general election for determination as to whether or not such act shall be repealed."

The judges evidently did not consider their words "It [the declaration of an emergency] is not subject to review by the courts, or any other authority except the people." They recognized that it is subject to review by the people, but they say that it shall not be reviewed in the way the people have said they will review it if they so desire. It is no answer to the proposition to say that the people have a remedy under the reserved power of initiative; that if they are dissatisfied with the act of the legislature they may initiate a bill to repeal the measure at the next general election. If the people had been content to adopt that plan alone, they would not have reserved the right of the referendum at all. When, therefore, the question comes whether the legislature has a right to declare an emergency which will take away the right of referendum, the doubt, if there be any, should be resolved in favor of the reserved power of the people instead of in the admittedly unwarranted declaration by the legislature. And in so declaring, the courts do not assume to say that the legislature has abused its discretion. They go no further than to say that the legislature cannot, by any act which is not clearly within its granted power, cut off the right of the people to say for themselves, at an election to be held for that purpose, whether its discretion has been abused, or no.

Now in this case the amendment does not touch the substance of the law relating to public lands. It says no more than that "A" shall give place to "B" on the state land board. It does not show wherein, and we cannot assume that, the act of "B" if continued as a member would incite breaches of the peace or jeopardize the safety of the state, or that the presence of "A" will give support to the state government where the presence of "B" would tend to its destruction. If the legislature passed an act granting a divorce to named persons and should say "this is a general law," every court in the land would say that the act was unconstitutional because the people had said "thou shalt not." It is so here. The people, having the old law, the mischief, and the remedy

in mind, have said one thing; the legislature, prompted by no apparent motive to preserve the peace and safety (they might with as much reason said health) of the state, have said another thing. When confronted by these two conflicting declarations, what is a court to do when its jurisdiction is properly invoked? Is it to say, it is helpless, or is it to say,

"The said legislative declaration has no greater effect and is no more binding upon the court than if the legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine. The question before us is simply one of construction or interpretation of an act of the legislature and of a provision of the constitution, and that is a judicial question." *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145, because,

"This amendment to the constitution provides a scheme for the exercise of what is known as the initiative and referendum and, of course, if possible, the language should be construed so as to make effective this reservation of power on the part of the people. It was clearly their purpose, except where the exigency of the public service demanded otherwise, that no legislative enactment should become operative until an opportunity were afforded the people to express their judgment as to the merits of the measure. The time within which a petition may be presented in contemplation of this action by the people is limited to ninety days after the adjournment of the legislature, and hence the manifest propriety of suspending for said period the operation of any measure that should be thus reviewed. The exceptions provided are ample enough to prevent any menace to the public welfare by reason of such delay incidental to a submission to popular vote, and they should not be given an interpretation so elastic as virtually to circumvent and nullify the will of the people so solemnly expressed in said constitutional provision." *McClure v. Nye, supra.*

The distinction between the power of the legislature to act in all cases where the limitation of its power is not definitely fixed in the constitution itself and where it is so fixed, is clearly marked and illustrated in the case of *Guthrie Nat.*

Bank v. Guthrie, 173 U. S. 528. Speaking of the limit of legislative power, the court said:

"That body is especially prohibited from passing any local or special law in regard to certain subjects enumerated in the act. Outside and beyond that limitation is the provision above mentioned [where a general law can be made applicable no special law shall be enacted], and whether or not a general law can be made applicable to the subject is a matter which is confided to the judgment of the legislature."

In other words, if the constitution says that no special laws shall be enacted where a general law can be made applicable, the decision of the legislature as to the proper bound of its authority will be treated as a legislative question and will not be reviewed by courts, but if the constitution specifically says that in a certain case, as for instance, the granting of municipal charters, no special law shall be passed, there is no room for discretion, and courts will review and say that a law passed in defiance of the constitutional limitation is no law. It is so in this case. The old law was that no act should take effect immediately except in a case of emergency. The courts very properly refused to define the boundary between discretion and abuse of discretion. The present constitution marks that boundary just as clearly as it has marked the boundaries covering certain subjects of special legislation. It has left no room for the exercise of discretion to the legislature when passing upon acts which are not, and cannot from their nature and subject-matter be held to be, necessary for the immediate preservation of the health, peace, or safety of the state or support of the government or the state institutions.

The whole error in the reasoning of the respondents, and the cases upon which they rely, is based upon the fundamental error that this inquiry involves a controversy of opinion between co-ordinate branches of the government. If the equation could be so stated, we might follow them. It cannot be so stated. There is another factor not occurring under the

old order where we took account of the executive, the representative body (the legislature) and the courts. There is now a fourth element, the people, reserving the right to assert its will over the legislative department of the government.

"Where the principle of direct legislation has been adopted, the legislative power is primarily in the people, and the old rule that the legislative body has primary power must be qualified. It is primary, and at the same time it is a permissive power—a power subject to dictation and to control." *Stetson v. Seattle*, 74 Wash. 606, 134 Pac. 494.

The true rule is: the referendum cannot be withheld by the legislature in any case except it be where the act touches the immediate preservation of the public peace, health, or safety, or the act is for the financial support of the government and the public institutions of the state, that is, appropriation bills. If the act be doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body.

Emergency, in the sense of the present constitution, does not mean expediency, convenience or best interest. There is no room for construction or speculation. The declaration is equivalent to saying that the referendum shall not be cut off in any case except in certain enumerated instances, none of which now occur.

We have treated the question as original or of first instance in this court, fully mindful of the rule that when one state adopts the laws or constitutional provisions of another state, it is generally held that constructions of the adopted law go along with it. This is an accepted rule and is supported by many cases and text writers, but no cases go so far as to hold that such rule is imperative or binding. Such constructions are persuasive but not conclusive. They will not be followed where they are not sustained in reason, or proceed from a misconception of the law, or are put upon a fundamentally wrong basis.

We think we have sufficiently met the *Kadderly* case. In doing so, we have also met the other cases relied on, for they were all decided upon the authority of that case; but, if we have not, the *Kadderly* case can be distinguished in that it involved an act creating a charter for the city of Portland. Cities are vested with the power to exercise the police power, and we may well say that the act fell without the exception or was so doubtful as to warrant the conclusion, if not the argument, of the court.

Without further reviewing the cases, it is enough to say that none of them grasp the reason or philosophy of the recent change in the fundamental law. They are in step with a tune that is dead. It is no answer to say that courts have always held to a certain rule, for as we have shown, the present condition has not existed heretofore. The first of the adjudged cases did not note the change, or rather did not count it as a change at all, and the others have followed it blindly and with the usual reverence for "authority." As Judge Dunbar said in *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179, "Law is a progressive science." If this be so, courts should not put themselves to the task of groping for "authority" to sustain a statute or an amendment to the constitution when it is clearly within the power of the legislature to pass it or of the people to adopt it.

But we are asked, How we can say what is within the police power and what is not? The answer is, How did we say, in the many cases decided by this court, that a given condition was within or without the police power? By the exercise of reasonable judgment; by measuring the premise by the standard, would the minds of reasonable men, in the light of the needs and necessities of the present, agree that the act is within the police power. And here let us reassert that the power of the legislature to except acts touching the police power is limited to acts immediately necessary to the preservation of the health, safety and peace of the state. It is not extended

to the general welfare or to the service of economy or convenience.

It may be argued that we can judicially notice the fact that the legislature is about to, or has, passed an act abolishing the state tax commission, and that this fact gives room for the exercise of a legislative discretion in the act under review. Our answer is, and we have sufficiently demonstrated it to be true, that there is no unlimited discretion. Nor will the functions of the state land commission be in any way interrupted by the fact that there may be a vacancy in its membership for a period of ninety days. Many boards are administered by a number less than the whole membership. We cannot presume that the peace and safety of the state or the support of its public institutions depends upon the act of a full board where a lesser number can transact its business with the same legality and formality as if the board were full. It may be argued that this holding will interrupt the future policy of the state as declared by the legislature; that inasmuch as a change must in any event be made, the court should not take it upon itself to say that the change should not be made immediately. Our answer is that we are not responsible for the present situation. The people have a right to adopt any system of government they see fit to adopt. In its workings, it may not meet their expectations; it may be unwieldy and cumbersome; it may tend to inconvenience and prodigality; it may be the expression of a passion or sentiment rather than of sound reason; but it is the people's government and, until changed by them, must be observed by the legislature and protected by the courts.

It may be suggested, also, that it is possible that some arrangement has been or may be made with the Federal government for the transfer of lands in lieu of lands lost to the specific congressional grants, and that the government might prefer to conduct its business with one board without the interruption incident to a change in the personnel of the board. We have sufficiently met this argument by the suggestion

that the constitution does not take into account convenience or necessity, except in so far as it touches the peace, health and safety of the state, nor can it be said that the personnel of the board can in any way affect the support of the state institutions. Courts must presume, until the contrary is shown, that every man who is in public office is competent to discharge the duties of that office, and that one man will perform his duty as conscientiously and with the same ability as another. If it were not so, the unfinished business of the government or the state would never be concluded. The personnel of the officer is only an incident. The office continues and we have no right to assume—for it is not shown to be so—that the relators will not discharge the duties of their office and with the same fidelity as will the respondents when they become incumbent. It may be added that the manner in which we administer our public lands is of no concern to the Federal government or any of its bureaus.

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Const., United States, Amendment X.

The *Attorney General* seeks to sustain his argument by reference to certain powers of the governor and the legislature, that is, that the governor may convene the legislature in extra session upon "extraordinary occasions;" the House may impeach and the Senate may convict "for high crimes or misdemeanors or malfeasance in office;" and reminds us that we would not in those instances assume to question the discretion of either the legislature or the governor.

The reason why the courts will not review such discretion is that no jurisdiction to inquire is vested in the courts by the constitution, and none is reserved by the people. If, however, the constitution provided, either expressly or by implication, that such declarations of the executive or legislative department should not become effective until a certain time had

elapsed, giving the people an opportunity to review the executive or legislative act, we would unhesitatingly declare that any act which tended in any degree to cut off this reserved right would violate the fundamental law. In the one case, the people did not see fit to provide for a review. In the instant case, they have reserved the right of review. The essence of our reasoning is not that the legislature has abused its discretion; that is really immaterial; but that the people shall have a right, if they see fit, to review its act and place the stamp of approval or disapproval upon it.

It was suggested in consultation that, whereas, the public institutions of the state are supported, in part at least, out of the public lands, we can say that it is for the legislature to determine whether the due administration of the public lands demands an amendment to the existing law; that it is a legislative and not a judicial question. Granting that this question might arise, it is not before us. The amendment does not go to the substance of the law or in any way touch matters of administration. It says only that the personnel of the board shall be changed, and this we have sufficiently discussed.

Neither is there any merit in the contention that the practice of the legislature to declare emergencies, and of the governor to approve them, running over the past twenty years, has been continued since the amendment of 1912 was adopted. A wrongful practice, if long continued, may result in a procedure. But however long continued, it will not repeal or nullify a constitutional mandate.

In so far as this case is concerned, it may be said that it can make no real difference whether this law goes into effect at the present time or ninety days after the close of the session. It is not at all likely that there will be a referendum. The people are not so much concerned in the name of the individual who administers the office as they are in the fact that the office is administered, and certainly it will not be doubted that respondents are capable of performing the duties of the office. But the principle involved is just as vital

as if it were a real case. In so far as it touches the initiative and referendum amendment to the constitution, it is as important as an act which may reasonably be expected to invite a review by referendum.

The real question is, Can the people, as distinguished from a representative legislative body, indulge in constructive legislation and reserve that right without interference by the legislature or the courts, except where, in certain enumerated instances, they have waived the right in order that the immediate necessities of health, peace and safety and the support of the government and our public institutions may be met by their representatives duly convened in legislative session? Section two of the act, amending § 6605, violates the seventh amendment to our constitution, and is void. The act will take effect ninety days after the legislature has adjourned. The writ will issue.

PARKER, HOLCOMB, MAIN, and ELLIS, JJ., concur.
FULLERTON, J., dissents.

MOUNT, J. (dissenting)—The majority of this court has declared that the act under consideration is not necessary "for the immediate preservation of the public peace, health, or safety, support of the state government and its existing public institutions." The legislature, a coordinate branch of the state government, on the other hand, has declared that the act is necessary for that purpose. The conclusion of this court is based upon the face of the act, which apparently removes one set of officers and substitutes other officers therefor. No facts are before us for consideration. It may be true that a change in these officers will not in the least affect the public peace, health, or safety, or the support of any state institution. But that depends entirely upon conditions and facts considered by the legislature, of which, in the very nature of things, we can have no knowledge. If the public peace, or health, or safety, is threatened, then no doubt the legislature has power to put into immediate effect any act

which in its judgment may be necessary for the preservation thereof. So far as we are advised, there is no immediate necessity for this act; but we are not advised upon that question. It may be true that the public peace and health and safety all demand the passage of some act for our immediate preservation. It may be true that this act was passed solely for that purpose, and that it was necessary to conceal the real object of the act in such a manner that its real purpose might not be obvious upon the face of the act. Who is to determine the facts upon which the law is based, and which called its enactment into existence, the legislature or the courts? This is the only question in this case. The answer obviously is, the legislature, because no other tribunal has been established for that purpose. As was said in the case of *Kadderly v. Portland*, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222:

"The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final."

See, also, *State ex rel. Lavin v. Bacon*, *Oklahoma City v. Shields*, and *Arkansas Tax Commission v. Moore*, *supra*, and other cases cited in the majority opinion.

The majority of this court apparently concede that, if the public peace, health, or safety is really threatened, then the legislature may put an act for the immediate preservation thereof into immediate effect. At least, if that position is not conceded, it is apparent from the provisions of the constitution quoted. When this is conceded, it follows that the legislature must determine the facts; otherwise, no emergency could be declared, and no law could take effect until the expiration of ninety days from the adjournment of the legisla-

ture. The rule of the majority necessarily nullifies the constitutional provision under consideration, and will create confusion and doubt in every case of emergency, because the rule is now established by the majority opinion that the courts must decide the fact of an emergency.

The constitutional provisions under consideration in this case were borrowed from South Dakota, Oregon, and Oklahoma. These states had decided the question here presented contrary to the view of the majority prior to the time this state adopted the amendment. See cases cited in the majority opinion. We knew the construction which had been placed thereon by those states, and presumably adopted that construction with the amendment. If there can be any doubt upon the proper construction of this constitutional provision, and the power of the legislature, that doubt should be resolved in favor of the construction placed thereon by those states.

The writ, in my opinion, should be denied. I therefore dissent.

MORRIS, C. J., and CROW, J., concur with MOUNT, J.

[No. 12257. Department One. March 9, 1915.]

THOMSON ESTATE, *Respondent*, v. WASHINGTON INVESTMENT COMPANY *et al.*, *Respondents*, GERMAN-AMERICAN BANK OF SEATTLE, *Appellant*.[1]

LANDLORD AND TENANT—COVENANTS—CONSENT TO LEASE—RIGHTS OF MORTGAGEES. Mortgagees and lienors, expressly assenting to a lease, are bound by the conditions thereof requiring the lessor to make repairs necessary to put the premises in fit condition for use.

SAME—RENT—RECOUPMENT FOR REPAIRS—RIGHT OF ACTION—EFFECT OF PAYING RENT. Payment of rent does not not waive a tenant's right of recovery for necessary improvements, agreed to be made by the lessor, inasmuch as the general statutes relating to counterclaims apply to actions for the recovery of rent, and a tenant, paying for repairs which the lessor had agreed to make to put the premises in fit condition for use, may elect to recoup his damages or bring a separate action therefor.

RECEIVERS—ACTION FOR RENT — IMPROVEMENTS — RECOUPMENT. A lessee's payments for improvements agreed to be made by the lessor being equivalent to payments of so much rent, the same should be allowed against the lessor's receiver, upon the lessor's insolvency.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 5, 1914, denying the claim of a lessee against the receiver of an insolvent for an amount paid for improvements, after a hearing before the court. Reversed.

Edwin H. Flick (*H. K. Luce*, of counsel), for appellant.

Bronson & Robinson and *H. B. Jones*, for respondents.

HOLCOMB, J.—On December 13, 1911, the Washington Investment Company, a corporation, was lessee from the Colman estate of certain premises in Seattle, King county, Washington. On said date, it executed a lease to the German-American Bank of Seattle, a corporation, for a term of years, to begin February 1, 1913. It was assumed that the room to be leased by the German-American Bank, which is the appel-

[1]Reported in 146 Pac. 617.

lant here, was unsanitary and not suitable for the purpose for which it was leased. The rent from January 1, 1913, graduated from $850 per month for the year 1913, to $1,000 per month for the year 1917, the last year of the term of the lease. It was covenanted in the agreement of lease, among other things:

"(2) The first party shall keep the premises in good repair, including floors, plumbing, heating apparatus, and the tinting of the walls and painting wood work, and also keep the window glass in good condition."

It was also agreed that the second party (appellant)

"shall have the privilege of changing the front of said premises, a right to put up partitions and other similar improvements, and put down a tile floor upon said premises without any permission, all such changes and improvements to be made wholly at the expense of second party."

After entering into possession of the premises, the appellant paid for the improvements necessary for its occupancy the amount thereof, $1,110.25, which the lessor covenanted to pay. There is no dispute as to the reasonableness of this sum. The permanent improvements expended by lessee amounted to the sum of $7,000. This the appellant does not claim the lessor should be responsible for. Upon the execution of the lease, the Colman company, owner of the fee, the Thomson Estate, owner of a prior mortgage, and Leopold M. Stern, owner of a prior mortgage, all signed written consents to the written lease upon the instrument itself, Leopold M. Stern qualifying his written consent by the following added words, "without in any wise waiving the priority of my mortgage lien." The Washington Investment Company, lessor, after the execution of the lease and before the commencement of the term thereof, became insolvent, and G. Alston Hole, vice president of the Thomson Estate, became receiver of the Washington Investment Company. This proceeding arises upon the application of the German-American Bank of Seattle to the receiver, G. Alston Hole, for the allowance of its claim for

improvements to the amount of $1,110.25. Upon the receiver presenting the matter to the superior court, where his appointment was made, after a hearing thereon, the claim was disallowed as against the receiver. The several mortgages against the said premises had previously been foreclosed or were in process of foreclosure.

The respondent Thomson Estate states in its brief:

"The question for review on this appeal is: What was the agreement between the parties and what is the legal effect of it? We do not raise any question as to the reasonableness of the charges, nor as to the necessity of the work being done to put the premises in habitable condition. We are willing to admit, so far as this appeal is concerned, that the work for which appellant makes claim in this action should have been performed by the Washington Investment Company, the lessor, under the terms of its lease."

As we view it, there is no question in this action as to whether Mr. Hole, the receiver for the Washington Investment Company, did or did not assent to the improvements which the Washington Investment Company had, by its agreement to lease, specifically authorized. And the Thomson Estate and other lienholders, having specifically assented to the agreement of lease with all the terms in it contained, are as much bound by the covenants thereof as if they had made the lease themselves. It was held in *Hardman Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059, that one leasing a room for a particular use was bound to put it in fit condition. This case was afterwards reaffirmed in *Shigeta v. Gaffney Investment Co.*, 72 Wash. 221, 136 Pac. 88. The general statutory provisions relating to counterclaims apply equally to actions for the recovery of rent. 18 Am. & Eng. Ency. Law (2d ed.), 323. In most jurisdictions the tenant is allowed to recoup against the landlord's claim for rent whatever damages he may have suffered, though unliquidated, on breach of the landlord's agreement, whether express or implied. 18 Am. & Eng. Ency. Law (2d ed.), 321, and cases cited. The tenant has a right to elect to recoup such damages, or he may bring

a separate action therefor. 18 Am. & Eng. Ency. Law (2d ed.), 322.

Inasmuch as the lessee has the right at his election to recoup the damages from the rent or to bring a separate action for their recovery, the fact that the lessee has paid the rent for the greater part of the term, after breach of the landlord's agreement upon which the tenant's claim for damages is based, will not deprive the tenant of the right to recoup such damages when sued for subsequent installments of rent. 18 Am. & Eng. Ency. Law (2d ed.), 230, 231, 322. If the agreement by the landlord and that by the tenant to pay rent are dependent, then the performance by the landlord of his agreement is a condition precedent to his right to rent. 18 Am. & Eng. Ency. Law (2d ed.), 230, 324.

There can be no question under the settled law that, had the Washington Investment Company itself remained solvent and sued for the rent of the premises under the lease, the lessee could have recouped the amount of its payments for repairs which the lessor agreed to make, from the rent due; and such being the case, the receiver of the lessor is equally bound. The payments made by the lessor for said improvements under the lease were equivalent to payments of so much rent. The claim should, therefore, have been allowed by the receiver and by the court.

From the foregoing considerations, the judgment is reversed, and the cause remanded with instructions to allow the claim.

MORRIS, C. J., PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 11382. *En Banc.* March 9, 1915.]

ELIZABETH WEBER, *Respondent*, v. WILLIAM DOUST *et al.*, *Appellants.*[1]

CONSTITUTIONAL LAW—LIBERTY—DUE PROCESS—FALSE IMPRISONMENT—DELINQUENT CHILDREN—UNLAWFUL DETENTION—LIABILITY OF OFFICERS. The purpose of the juvenile delinquency act being protection, and not punishment, an officer arresting and detaining a person thought to be a delinquent child, without any complaint being filed or summons issued therefor as required by the act (Rem. & Bal. Code, § 1991), is not guilty of false imprisonment, as a matter of law, in that the restraint was without due process of law; but whether the officer acted wrongfully to serve a purpose inconsistent with the purposes of the act would be a question for the jury under proper instructions; in view of the duty of the state to act as *parens patriae*, and the common law powers of courts of chancery in aid of the statute for the exercise of the state's guardianship over infants (overruling on rehearing Id., 81 Wash. 668).

INFANTS—GUARDIANSHIP—POWERS OF STATE. The right of the state to exercise guardianship over a child does not depend upon statute.

FALSE IMPRISONMENT—DELINQUENT CHILDREN—PARENT AND CHILD. Detention of delinquent children, in the nature of parental restraint, is not imprisonment under a criminal statute, and no constitutional right is violated thereby.

FALSE IMPRISONMENT — ARREST WITHOUT PROCESS — DELINQUENT CHILD. An officer detaining a delinquent child without complying with the juvenile delinquency act is not liable for false imprisonment if he acts in good faith, in furtherance of the law and for the welfare of the child; but he acts at his peril if he abuses his authority, and is a trespasser *ab initio* and liable for false imprisonment if he did not act in good faith in furtherance of the law, or if actuated by ulterior purposes.

PARKER, ELLIS, and MAIN, JJ., dissent.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered May 12, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for false imprisonment. Reversed.

[1]Reported in 146 Pac. 623.

H. M. Stephens and *Wm. E. Richardson*, for appellants.

Geo. W. Shaefer, for respondent.

ON REHEARING.

CHADWICK, J.—This case was before the court and decided in favor of the respondent by a divided department, 81 Wash. 668, 143 Pac. 148. A rehearing has been had, and a majority of the judges are of the opinion that there is merit in the opinion of the majority and in that of the minority; that both declare a true rule when properly applied, and although it be held that restraint without a warrant may be a false imprisonment and that a party so held may be entitled to set up that he is restrained without due process of law, yet the juvenile delinquent act must be given its place in the statute law of the state, and that a mere restraint by an officer of the law without warrant cannot be held to be a false imprisonment as a matter of law.

Without repeating what was said in the dissenting opinion with reference to the objects and purposes of the juvenile act and the rule of construction there prescribed by the legislature itself, it is not out of place to say that this court has, in at least three recent cases, held that the act "is not punitive in its nature or purpose."

"The policy underlying this law is protection, not punishment. Its purpose is not to restrain criminals to the end that society may be protected and the criminal perchance reformed; it is to prevent the making of criminals." *In re Lundy*, 82 Wash. 148, 143 Pac. 885; *Viereck v. Sullivan*, 77 Wash. 313, 137 Pac. 456; *State ex rel. Syverson v. Foster*, *ante* p. 58, 146 Pac. 169.

It seems to be incumbent, therefore, upon this court to mark a line of cleavage between the law of false imprisonment and a restraint under the juvenile act. Appellants sought to mark this line by requested instructions, but the court below took the position, and consistently held to it and so instructed the jury, that there had been a false imprisonment as a matter of law.

We think the true rule is that, where an officer proceeds in good faith and in the execution of the duties put upon him by the spirit or letter of the juvenile act, a false imprisonment does not result as a matter of law. Whether there has been an outrage of the rights of the restrained one should be made to depend upon the will and purpose, the motive, of the one who restrains him. If the officer proceeds in good faith, imposing no hardship other than a detention under proper and wholesome surroundings, and for the purpose of protection or inquiry, he should not be held liable in damages. Cases might be readily conceived where it would be the legal, as well as the moral, duty of any man, whether he be an officer or not, to take a child and restrain it for its own protection pending a legal inquiry and investigation of its needs and surroundings. On the other hand, if an officer should proceed defiantly and under circumstances indicating a willful purpose to arrest and detain without just cause, or to serve a purpose inconsistent with the objects of the juvenile act, he should be held liable. Whether the due process clause of the constitution or the juvenile act is controlling depends upon the facts of the given case, to be considered by the jury under proper instructions from the court.

"It is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." *Moyer v. Peabody*, 212 U. S. 78.

See, also, *Ex parte Wall*, 107 U. S. 265.

A false imprisonment implies a battery or an unlawful force, although the restraint may be no more than an overcoming of the will. It is a wrongful restraint that is punishable or for which a recovery in damages may be had. It is not every restraint that is unlawful.

"In certain relations a degree of restraint is permitted by the law, for which no writ or legal process of any sort is usually required. The following are the cases referred to: The parent in respect to the child, the guardian in respect to the ward, the master in respect to his apprentice, the teacher

in respect to his pupil, and the bail in respect to his principal. . . .

"Restraints are admissible within such limits as the parent, guardian, teacher, or master, in the exercise of a sound discretion, may decide to be necessary. To a certain extent a judicial power is vested in him which others are not at liberty to interfere with, except in a case of manifest abuse." 1 Cooley, Torts (3d ed.), p. 299.

Upon the abolition of the court of wards in England, the care of infants fell to the King and was exercised through the court of chancery, as will be seen by reference to the authorities hereinafter cited. The care and protection of infants was a prerogative of the crown. 3 Blackstone, Commentaries, 427.

"When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. And this power still remains with them except so far as they have delegated a portion of it to the Federal government. The sovereign will is made known to us by legislative enactment. The state, as a sovereign, is the *parens patriae*." *Fontain v. Ravenel*, 17 How. 369, 384.

"This prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves. Lord Chancellor Somers, in *Cary v. Bertie*, 2 Vernon, 333, 342, said: 'It is true infants are always favored. In this court there are several things which belong to the King as *pater patriae* and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc.'" *Romney v. United States*, 136 U. S. 1.

The right of the state to exercise guardianship over a child does not depend on a statute asserting that power. Such statutes are only declaratory of the power already and

always possessed by courts of chancery, and they will even now exercise that power concurrently or in aid of a statute. *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. 885; *Johnson v. McNabb*, 7 Ind. App. 393, 34 N. E. 667.

Summary restraints and detentions have been generally sustained where they have occurred under an exercise of the sovereign or police power of the state, for as was said in *Barbier v. Connolly*, 113 U. S. 27:

"But neither the amendment [14th amendment]—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

See, also, *Hutchinson v. Valdosta*, 227 U. S. 303.

It has been accordingly held that detention in the nature of parental restraint is not in any proper sense an imprisonment under a criminal statute. Wherever the question has been raised it has been held that such acts do no violence to the provisions of the constitution, state and national, guaranteeing a trial by jury and that no one shall be restrained of his liberty without due process of law. McGehee, Due Process of Law, 344; *Reynolds v. Howe*, 51 Conn. 472-8; *In re Kol*, 10 N. D. 493, 88 N. W. 273; *House of Refuge v. Ryan*, 37 Ohio 197; *Prescott v. State*, 19 Ohio St. 184; *County of McLean v. Humphreys*, 104 Ill. 378; *Petition of Ferrier*, 103 Ill. 367, 42 Am. Rep. 10; *Ex parte Ah Peen*, 51 Cal. 280; *McCarthy v. Hinman*, 35 Conn. 538; *Ex parte Crouse*, 4 Wharton (Pa.) 9; *Adeline G. Nott's Case*, 11 Fairfield (Me.) 208; *Milwaukee Industrial School v. Supervisors of Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702; *Van Walters v. Board of Children's Guardians of Marion County*, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431; *Farnham v. Pierce*, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452; *In re Kelley, Petitioner*, 152 Mass. 432, 25 N. E. 615; *In re Wares*, 161 Mass. 70, 36 N. E. 586; *Hunt v. Wayne Circuit*

Judges, 142 Mich. 93, 105 N. W. 531, 3 L. R. A. (N. S.) 564; *People ex rel. Van Heck v. New York Catholic Protectory*, 101 N. Y. 195, 4 N. E. 177; *Kennedy v. Meara*, 127 Ga. 68, 56 S. E. 243; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914 A. 1222, 45 L. R. A. (N. S.) 908; *Wilkeson v. Board of Children's Guardians of Marion County*, 158 Ind. 388, 62 N. E. 481; *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 115 N. W. 682; *State v. Brown*, 50 Minn. 353, 52 N. W. 935, 36 Am. St. 651, 16 L. R. A. 691; *Ex parte Nichols*, 110 Cal. 651, 43 Pac. 9; *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198; *State v. Dunn*, 53 Ore. 304, 99 Pac. 278, 100 Pac. 258; *State v. Eisen*, 53 Ore. 297, 99 Pac. 282, 100 Pac. 257; *In re Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; *In re Powell*, 6 Okl. Cr. 495, 120 Pac. 1022; *In re Watson*, 157 N. C. 340, 72 S. E. 1049; *State ex rel. Caillouet v. Marmouget*, 111 La. 225, 35 South. 529; *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. 935.

In the case of *State ex rel. Bethell v. Kilvington*, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284, a child was detained without observing the formalities imposed by statute. The court measured the right of the parent with that of the state to exercise its parental function and held, upon a *habeas corpus* proceeding, that the child had not been held under a penal statute, and further,

"But when it clearly appears that it is not for the welfare of the state or the child that it should be taken from such an institution, the court will not so direct, but will leave the child where its safety, purity, and well-being requires. And this without regard to the informalities of its commitment, the court, for the time being, acting as its custodian. The right of the parent is sufficiently guarded by permitting the parent on *habeas corpus* proceedings to inquire into the propriety or necessity of the detention, and to have the custody restored, upon a proper showing that he or she is competent, and a proper person to have charge of the child."

See, also, *Farnham v. Pierce, Milwaukee Industrial School v. Supervisors of Milwaukee County, In re Kelley, Petitioner, Kennedy v. Meara,* and *Prescott v. State, supra.*

In *Dallemagne v. Moisan,* 197 U. S. 169, a seaman was restrained by the chief of police under a requisition issued directly to him by the French consul at San Francisco, under a treaty contracted between the United States and France in 1853. He sued out a writ of *habeas corpus.* On error to the supreme court of the United States, it was urged that no information or indictment had been filed, and that a Federal treaty could not impose upon a state officer a function violating a constitutional right. The court held that, under a statute later in time, the requisition should have been presented to the district court; that the arrest should have been made by the marshal, and that the arrest by the chief of police was unauthorized, and further,

"When, however, the defendant was brought before the district court of the United States upon the writ of *habeas corpus,* that court being mentioned in the statute as one of the authorities to issue warrants for the arrest of the individual complained of, and having power under the statute to examine into the question and to commit the person thus arrested to prison according to the provisions of the act, it would have been the duty of the court, under such circumstances, upon the production of the defendant under the writ, and upon the request of the consul, to have made an examination, and to have committed the defendant to prison if he were found to come under the terms of the treaty. It was, therefore, but a formal objection to the regularity of the arrest, which would have been obviated by the action of the court in examining into the case, and the defendant would not have been entitled to discharge merely because the person executing the warrant was not authorized so to do."

In the case of *Wisconsin Industrial School for Girls v. Clark County,* 103 Wis. 651, 79 N. W. 426, the court held:

"The power to place children under proper guardianship has been exercised by chancellors and judges exercising chancery powers from time immemorial. Said Lord Redesdale in

1828, in *Wellesley v. Wellesley*, 2 Bligh (N. S.), 124, the right of a chancellor to exercise such power has not been questioned for 150 years. Such a proceeding is not a trial for an offense requiring a common-law, or any, jury . . . As said, in substance, in the *Ferrier Case*, the proceeding is not one according to the course of the common law in which the right of trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law,—none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered."

There being no imprisonment or restraint of liberty in the constitutional sense, the state, in the exercise of its prerogative or sovereign right, may take a child from a parent when the parent is unworthy, or if it appear that the child's interest may be best served by so doing. The right may be exercised by warrant, or, if not, it may be adjudged by subsequent proceedings.

"Neither proceedings according to common law, nor judicial proceedings in a formal court for the trial of actions,

are essential to due process. 'Though it generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings yet this is not universally true.'" McGehee, Due Process of Law, 52.

"It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 18 How. (U. S.) 272.

"Due process is not necessarily judicial process." *Reetz v. Michigan*, 188 U. S. 505, 507.

There is much fault in the general conception of liberty. Man in his natural state may have natural liberty if he has the physical power to maintain it. In his civil state he must yield the natural right to obey his impulses and to go at will to the social compact, whatever may be its form. In return society gives to all who subscribe to its forms a guarantee that it will protect him in those "civil" rights which by nature or by due ordination of law are recognized as essential to the health, peace and happiness of the greater number.

"Civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public." 1 Blackstone, Commentaries, 125.

Thus liberty, in so far as it is noticed by government, is restraint rather than license. It is a yielding of the individual will to that of the many, subject to such constitutional guarantees or limitations as will preserve those rights and privileges which are admitted of all men to be fundamental, or, by opposite expression, such rights as are peculiar to the individual and which may be exercised without harm to the social compact.

"It is not natural, but civil, liberty of which a person may not be deprived without due process of law. There are restrictions imposed upon personal liberty which spring from the helpless or dependent condition of individuals in the vari-

ous relations of life, among them being those of parent and child, guardian and ward, teacher and scholar. There are well recognized powers of control in each of these relations over the actions of the child, ward, or scholar, which may be exercised. These are legal and just restraints upon personal liberty, which the welfare of society demands, and which, where there is no abuse, entirely consist with the constitutional guaranty of liberty." *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914 A. 1222, 45 L. R. A. (N. S.) 908.

Liberty in the civil state is a giving up of natural right in consideration of equal protection and equal opportunity; a sacrifice on the part of the strong that the weak may live; that order may be established and that wrongs and impositions may be condemned and punished. The interest and object of the state is, therefore, to reduce the strong to the level of equal rights and to elevate the weak and helpless to the same plane. To do this the state has the right to insist that every child that is born shall come to the stature of man obedient to the forms of government and in physical and moral health. The state in short, is *parens patriae*, the only limitation being that its power shall not be arbitrarily exercised and that its laws shall operate equally upon all who are similarly situated. This is "due process." This is the meaning of "the law of the land."

We desire to repeat and reaffirm that part of the dissenting opinion wherein it is said that the statute is silent,

"as to detention pending an investigation. It will defeat the law entirely to say that a child cannot be detained for a time under proper, wholesome and helpful surroundings, such as were afforded in this case, and innocent and unoffending children, and those who are simply mischievous, will be subjected to the stigma which attaches to criminal suspects." *Weber v. Doust*, 81 Wash. 668, 675, 143 Pac. 148.

When, therefore, the legislature enacted the juvenile act, it only put in the form of a written statute that power which is inherent in the state. It met an omission of the law, for

theretofore the right of guardianship depended upon and was exercised by an individual acting under a decree made in a particular case. The legislature recognized that the purpose of the law might ofttimes be defeated by the delays incident to necessary preliminary proceedings. *Farnham v. Pierce, supra.*

The statement in the dissenting opinion in this case that a recovery could not be had unless we held the juvenile act to be a penal statute was too broad; for, under the general rules of law, an officer might be liable if, in the exercise of his right to restrain an infant under the provisions of the juvenile act or under the general power *parens patriae*, he went further than the law allowed, or imposed an arrest, as at common law, upon the infant. A person thus detained is not deprived of his common law remedies.

"It is urged, if this course is held lawful, there is no remedy, if a citizen is ever so unjustly charged, by the overseers. We do not so understand the law. They act at their peril. If they cause a citizen to be arrested and restrained, upon an unwarranted assumption of facts, they are answerable in damages." *Adeline G. Nott's Case*, 11 Fairfield (Me.) 208.

If an officer abuses his authority, he is a trespasser *ab initio* and liable for false imprisonment. 1 Cooley, Torts (3d ed.), p. 314.

In other words, an officer acting as such stands in the same relation to the infant as would a guardian appointed by and acting under the due process of a court having jurisdiction to appoint guardians. The only question to occur is whether the officer has acted in furtherance of the law, in good faith, and has done that which he believed to be for the best interests of the child, bringing no wilful harm to it and being actuated by no ulterior purpose. 1 Cooley, Torts (3d ed.), p. 356.

At the first hearing, a majority of the Department were of the opinion that any restraint without a formal complaint

and warrant was an arrest without due process, and did not, for that reason, notice the other assignments of error.

There is some testimony which fairly raises the question whether the defendants were prompted by the spirit of the juvenile act when they laid the hand of the law upon respondent, or whether they restrained her, actuated by an ulterior purpose, to gather testimony in an entirely independent proceeding. It is the opinion of the majority of the court that this difference is sufficient to carry the case to the jury.

Having come to our present conclusion after consideration of the whole case, and finding that the theory which we now adhere to was submitted to the trial judge in the way of requested instructions which were by him rejected, it follows that the case should be reversed and sent back for a new trial.

MORRIS, C. J., MOUNT, CROW, HOLCOMB, and FULLERTON, JJ., concur.

PARKER, J. (dissenting)—I dissent upon the grounds stated in the former opinion. I regard the majority opinion as establishing a rule of law endangering constitutional liberty, in view of the fact that the plaintiff was not arrested or detained as a suspected criminal, but in defiance of the plain procedure expressly provided by the statute.

ELLIS and MAIN, JJ., concur with PARKER, J.

[No. 12231. Department One. March 10, 1915.]

J. P. LAUGHLIN *et al.*, *Appellants*, v. SEATTLE TAXICAB & TRANSFER COMPANY, *Respondent*.[1]

MUNICIPAL CORPORATIONS—INJURY TO PEDESTRIANS—STREETS—NEGLIGENCE—LAST CLEAR CHANCE. Where pedestrians, struck by a taxicab just as they were stepping from the curb, were not seen by the driver, there is no room for the operation of the rule of last clear chance.

TRIAL—BY COURT—FINDINGS OF FACT. In an action for personal injuries, tried to the court, in which the court stated that the case should be submitted on the facts, and overruled a motion for nonsuit and denied a challenge to the sufficiency of the evidence at the close of the case, and held that the plaintiff could not recover on account of contributory negligence, the decision was one on the facts.

APPEAL—REVIEW—FINDINGS. Upon a close question of fact, findings are entitled to weight and will not be set aside on appeal unless not sustained by the preponderance of the evidence.

MUNICIPAL CORPORATIONS—STREETS—INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where pedestrians saw an approaching taxicab eighty feet away, when nine feet from the curb as they entered the street, and were struck by the taxicab just as they stepped from the curb, findings that they were guilty of contributory negligence are sustained.

Appeal from a judgment of the superior court for King county, Humphries, J., entered April 6, 1914, dismissing an action for personal injuries sustained by pedestrians struck by a taxicab, tried to the court. Affirmed.

Gay & Kelleran, for appellants.

Brightman, Halverstadt & Tennant, for respondent.

CHADWICK, J.—Plaintiffs, while crossing Stewart street at Second avenue, in the city of Seattle, were struck by a taxicab driven by an employee of the defendant. Plaintiffs brought this action alleging negligence in several particulars, more particularly that the machine was driven at a speed greater than ten miles an hour and that no horn was blown

[1]Reported in 146 Pac. 847.

or sounded, or warning given. Defendant plead and relied at the trial on the defense of contributory negligence. Stewart street is about thirty-five feet wide from curb to curb. When plaintiffs had taken a step or two into Stewart street, they saw the taxicab approaching. When they had proceeded to within about nine feet of the curb, the taxicab was about eighty feet away. They were struck just as they were stepping from the street to the curb. The testimony of both the plaintiffs and the defendant agree that the driver of the taxicab did not see the plaintiffs, and we hold with the trial court that there is no room for the application of the doctrine of last clear chance. Granting that the driver was negligent, the only question is whether the negligence of the plaintiffs contributed to, and was the proximate cause of, the accident. After hearing all the evidence, the court was of the opinion that "these people could have avoided this injury had they exercised ordinary and reasonable care."

Counsel for plaintiffs did not seriously contend upon the argument that the judgment of the court could not be sustained if the court had decided the case upon the facts; but it is earnestly and seriously insisted that the court did not so decide the case, but rather decided it as a matter of law, inasmuch as the court denied a motion for a nonsuit and a motion for a judgment when the testimony was all in. When the motion for a nonsuit was made, the trial judge said:

"I really think this should be submitted on the evidence and not on the demurrer. I have already decided on the case as being sustained on my rulings and I don't want it to go off on a technical error of any kind. I will deny the motion for a nonsuit."

At the close of the case, the legal sufficiency of the evidence was challenged. The record is:

"By the Court: Motion denied; exception allowed, and immediately thereafter:

"By the Court: Do you want to submit the case on testimony? I will state to you I am ready to decide the case."

The court then proceeded to discuss the facts and the law and finally said: "I don't think the plaintiff can recover in this case."

We think, when the whole record is read, that it is plain that the court decided the case upon the facts. Cases of negligence usually involve mixed questions of law and fact, and it is clear that the court was of the opinion that, under the facts, the law did not justify a recovery. Because of the insistence of counsel and his unusual assignment, we have not contented ourselves with the abstract but have carefully read the whole record. We have no doubt, if a jury had returned a verdict upon the evidence, that we would have refused to set it aside. Upon a close question of fact, the judgment of the trial judge is entitled to weight, and will not be set aside unless we can say that it is not sustained by a preponderance of the evidence. *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *Zizich v. Holman Security Inv. Co.*, 77 Wash. 392, 137 Pac. 1028, 139 Pac. 57; *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 137 Pac. 342; *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 189, 1200; *Mueller v. Vancouver*, 81 Wash. 384, 142 Pac. 868.

We are not prepared to say that the judgment is not sustained by a preponderance of the evidence. Affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and MOUNT, JJ., concur.

[No. 12000. Department Two. March 10, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK I. SEFRIT, *Appellant*.[1]

CONTEMPT—NEWSPAPER COMMENT—PENDENCY OF COURT PROCEEDINGS—NECESSITY. Where the fish commissioner, cited to appear and testify before the grand jury, for his own protection secured an order of court directing him to appear and testify or show cause why he should not be punished for contempt, to which order he assented, the matter of his giving testimony was fully adjudicated and determined, and no controversy was pending; hence subsequent newspaper comment thereon, prior to the giving of the testimony, which would have been contumacious if an action had been pending at the time of the publication, is not contempt of court.

SAME — PREJUDICE TO PARTY — REASONABLE DOUBT. Constructive contempt by newspaper comment on judicial proceedings requires that the matter must have a reasonable tendency to prejudice a party to a pending action, or substantially interfere with the administration of justice; and being *quasi* criminal, every reasonable doubt must be resolved in favor of the accused.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered January 19, 1914, upon a trial and conviction of contempt. Reversed.

Newman & Kindall and *John C. Higgins* (*Hyman Zettler*, of counsel), for appellant.

Frank W. Bixby, for respondent.

MAIN, J.—This is a contempt proceeding which grew out of the following facts: On or about November 17, 1913, a grand jury was impaneled by the superior court for Whatcom county, Washington. This grand jury remained in session until a time subsequent to the happenings out of which this proceeding arose. On the 26th day of November, 1913, a subpoena *duces tecum*, directed to L. H. Darwin, state fish commissioner, was issued. This subpoena directed the fish commissioner to appear before the grand jury on

[1]Reported in 146 Pac. 864.

the 4th day of December, 1913, and there testify; and also directed him to produce as evidence the books and records of his office relative to certain matters mentioned in the subpoena. The subpoena was served upon the fish commissioner on November 26, 1913. Thereupon the fish commissioner sought the advice of the *Attorney General* as to whether or not he had a right to testify and divulge the information called for without incurring the penalty provided for in Rem. & Bal. Code, § 5225 (P. C. 191 § 101). This section of the statute provides, that all reports showing the status of the business of any person required under the provisions of the act, to be made to the fish commissioner, shall by that officer be treated as confidential, and shall not be published "unless their publication shall be necessary in some civil or criminal proceeding." For a violation of this section the commissioner is subject to be punished by a fine not exceeding $1,000. In response to the inquiry, the *Attorney General* advised the fish commissioner as follows:

"We are of the opinion that your own rights in the matter would be amply protected by calling the attention of the grand jury to section 5225, Rem. & Bal. Code, and stating to them that you feel it your duty to claim the privilege of refusing to divulge the matters required of you unless the court should order you so to do."

On December 4, 1913, the fish commissioner appeared before the grand jury in response to the subpoena which had been served upon him, and there exhibited the letter which he had received from the *Attorney General.* He stated, in response to a question, that he was perfectly willing to testify should the court so order, and that all he cared for the order of the court was to protect himself against the $1,000 penalty imposed by statute. It appears that thereupon the fish commissioner was excused until the court order which he referred to could be secured. During the afternoon of this day, the prosecuting attorney, by affidavit, submitted the facts to the Honorable Ed. E. Hardin, one of the judges

of the superior court for Whatcom county. Judge Hardin signed and caused to be entered an order which directed the fish commissioner to appear before the grand jury forthwith, or as soon thereafter as required by the grand jury, and there submit himself as state fish commissioner for interrogation, and the books and records of his office for inspection, or failing so to do, to appear before the court at 9:30 o'clock on the morning of December 5, the day following, and there show cause why he should not be punished for contempt for failing to obey the order of the court. The order recited that L. H. Darwin was present and expressed a willingness to abide by the order of the court whatever that might be, and that he made no other defense than the section of the statute referred to in the affidavit of the prosecuting attorney (Rem. & Bal. Code, § 5225; P. C. 191 § 101). After the order had been entered, the prosecuting attorney advised the fish commissioner that his presence was desired before the grand jury at 9 o'clock the following morning, viz., December 5, 1913. At that time the fish commissioner appeared and remained in attendance until some time during the forenoon of that day, when he was called before the grand jury, where his testimony was given.

On the morning of December 5, and before the time fixed for the fish commissioner to appear before the grand jury on that day, there was published in the American-Reveille, a daily newspaper, of which the defendant is editor in chief and manager, an editorial which contained some comment upon the proceedings wherein the fish commissioner was directed to testify before the grand jury, or show cause why he should not be punished for contempt for failing so to do. The publication of this editorial was, by the trial judge, conceived to be contempt of court. On December 6, 1913, by order of Judge Hardin, this contempt proceeding was instituted by the filing of an affidavit by the prosecuting attorney. The defendant was cited to appear and show cause why he should not be punished for contempt of court in publishing

the editorial referred to. On January 19, 1914, the court entered an order in which the defendant was adjudged to be guilty of contempt of court, and directing that he "be punished therefor by being committed to the county jail for the space of ten days," and that the costs of the proceeding be charged against him. From this judgment, the appeal is prosecuted.

The controlling question is, whether the editorial referred to was a comment upon a proceeding then pending in court. It will be assumed, for the purposes of this opinion, that the editorial was contumacious, if at the time of its publication an action was pending in court upon which there was comment. If no proceeding were pending, it will hardly be contended that the article published constituted a contempt. If a proceeding were pending, it was the one relative to the order directing the fish commissioner to appear before the grand jury and testify, and submit his books for examination, or show cause why he should not be punished for contempt. The question then is, whether the action was pending when the publication took place. The only purpose of the proceeding was to secure an order of the court and thereby exonerate the fish commissioner from liability under the statute on account of disclosing confidential information. The fish commissioner was at no time unwilling to testify. When first called before the grand jury he declared his willingness to testify. To others he expressed the same attitude. It is true that, upon the trial, he testified that, if any one interested in the fish business had appeared and desired to contest the granting of the order on the morning of December 5, he would have permitted him to do so. The order, however, recited, that, on the previous day when it was entered, the fish commissioner was present and consented thereto. Upon the trial he testified that he was not present when the affidavit was presented to the court and the order made. The order was secured at his instance and for his special protection. The

order as entered did not direct the fish commissioner to appear and give his testimony, or show cause why he should not so testify, but directed him to appear and testify, or show cause why he should not be punished for contempt for failing to obey the order of the court. So far as his appearing to testify was concerned, the matter was finally adjudicated and determined.

Some point is made of the fact that the fish commissioner upon the trial testified that, if any one interested in the fish business had appeared on the morning of December 5 before he was called before the grand jury, and desired to contest the order, he would have permitted him to do so. It is difficult to see how, even if such person had appeared, that a substantial contest could have been waged, either by the fish commissioner, or any one on his behalf, over an order which was secured at his special instance and request, and which recited that he was present when it was entered, and that he consented thereto.

When the article complained of was published, there was no substantial pending litigation. There was no party to a proceeding which the article would have a reasonable tendency to cause to be substantially prejudiced in the conduct of a cause. Neither can the article be said to substantially interfere with the due administration of justice, there being then no pending litigation.

In the recent case of *State ex rel. Dorrien v. Hazeltine*, 82 Wash. 81, 143 Pac. 436, the defendant was charged with contempt by reason of the fact that he published, or caused to be published, an article in his newspaper which was claimed to be comment upon a proceeding then pending in court. The doctrine was there announced that the matter charged must have a reasonable tendency to cause substantial prejudice to a party in the conduct of an action, or to substantially interfere with the due administration of justice. The essence of the offense is conduct reasonably calculated

to create an atmosphere of prejudice where a pending case is to be tried. It was there said:

"The essence of the offense is conduct reasonably calculated to produce an atmosphere of prejudice where a pending case is to be tried. *King v. Tibbits*, 2 British Ruling Cases 469. But the better view is that one will not be punished for a technical contempt. The matter charged must have a reasonable tendency to cause substantial prejudice to a party in the conduct of the action, or to substantially interfere with the due administration of justice. *Hunt v. Clarke*, 58 L. J. (Q. B.) 490. The basis of this rule is that a proceeding for constructive contempt is *quasi* criminal, and every reasonable doubt will be resolved in favor of the accused. *Hutton v. Superior Court etc. of San Francisco, supra.* [147 Cal. 156]."

Under the doctrine of that case, the present action cannot be maintained. In support of the contention that an action was pending when the editorial was published, the case of *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717, is cited. In that case, an opinion by this court was filed on February 18, 1898. On February 24, the defendant caused to be published a contumacious article. On February 28, a petition for modification of the opinion of the court was filed. Thereafter, and on March 2, 1898, an opinion of the court was filed denying the petition for modification. It was there held that, since the publication occurred during the time in which a litigant had a right to file a petition for rehearing, an action was pending in court. But that case does not reach the facts in the present case. Here, as already stated, when the publication took place, there was no substantial litigation pending. The order was desired and secured for a special purpose, that of protecting the fish commissioner from liability under the statute. This purpose had been accomplished. Further controversy over the matter was hardly within the range of possibility, if, indeed, it can be said that there was any pending controversy at any stage of the proceeding.

Other questions are discussed in the briefs; but these become immaterial in view of what has been said upon the primary question.

The judgment will be reversed, and the cause remanded with direction to dismiss the proceeding.

FULLERTON, MOUNT, CROW, and ELLIS, JJ., concur.

[No. 12222. Department One. March 10, 1915.]

SIBBIE P. PAYSSE *et al.*, *Respondents*, v. MATTIE T. PAYSSE, *Appellant*.[1]

LIBEL AND SLANDER—INSTRUCTIONS—CONTRADICTORY INSTRUCTIONS. In an action for slander in orally charging that plaintiff was a bastard, it is reversible error to give instructions that are contradictory, telling the jury that, in the one charge, the words were libelous *per se*, and in a similar charge, that they were not so.

SAME—WORDS ACTIONABLE PER SE—BASTARD. Orally charging that plaintiff is a bastard is not actionable *per se*.

SAME—INSTRUCTIONS—ISSUES AND PROOF. In an action for slander in orally charging that plaintiff was a bastard, it is reversible error to instruct the jury that there could be a recovery if the plaintiff was especially damaged, when there was no allegation or proof of special damages.

APPEAL AND ERROR—REVIEW—PRESUMPTIONS—PREJUDICE. Upon a disputed question as to alleged slanderous statements, prejudice will be presumed where the jury were instructed that statements were actionable *per se* and malice would be presumed, necessarily resulting in damage, when the statements were not libelous *per se*.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 24, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for slander. Reversed.

[1]Reported in 146 Pac. 840.

Reed & Hardman and *Hughes, McMicken, Dovell & Ramsey*, for appellant.

Tucker & Hyland, for respondents.

MOUNT, J.—This is an action for slander. The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiffs for $3,000. The defendant has appealed.

Several errors are assigned in the appellant's brief, but we think there is no merit in any of these assignments except the one upon the instructions, and that the verdict is excessive. We shall therefore proceed to discuss these assignments.

The complaint, in paragraph 2, alleged that, at a certain time, the defendant spoke these false and defamatory words, to wit:

"That the said Sibbie P. Paysse is a son of a bitch; that Sibbie P. Paysse is a bastard, that the father and mother of said Sibbie P. Paysse were never married, and I know it and I can prove it; that the said Sibbie P. Paysse's wife is a whore and that the said Sibbie P. Paysse is living with her knowing her to be such."

Paragraph 3 alleges that the defendant spoke the following words of and concerning the plaintiffs:

"That Sylvan Paysse (the father of plaintiff Sibbie P. Paysse) and Mary Paysse (the mother of plaintiff Sibbie P. Paysse) were not legally married and that the said plaintiff Sibbie P. Paysse was a bastard."

Paragraph 4 alleges that the defendant spoke the following words:

"That the said Sibbie P. Paysse had married a whore; that the father and mother of said Sibbie P. Paysse were never married and that said Sibbie P. Paysse was a bastard."

Paragraph 5 alleges that the defendant spoke the following words, to wit:

"That the said Sibbie P. Paysse had married a whore; that Belle Paysse, the wife of said Sibbie P. Paysse, was a pros-

titute; that the said Sibbie P. Paysse was a son of a bitch, and that the said Sibbie P. Paysse was a bastard."

Paragraph 6:

"That the said plaintiff Sibbie P. Paysse was a bastard, and that the wife of said Sibbie P. Paysse was a prostitute."

Paragraph 7:

"That she would not let plaintiffs see their father (meaning S. Paysse, Sr., the father of plaintiff Sibbie P. Paysse) for the reason that the said Sibbie P. Paysse was a bastard; that his wife was a disgraceful character, to wit, a prostitute."

Paragraph 8:

"That he, the said plaintiff, was not entitled to any of the property of his father (thereby meaning, and leading the said Baker to understand him to mean S. Paysse, Sr.) for the reason that said S. Paysse, Sr. and his former wife, the mother of plaintiff Sibbie P. Paysee, were never married, and that the said Sibbie P. Paysse was a bastard."

Paragraph 9:

"That the said Sibbie P. Paysse was a bastard and that his father and mother had never been married."

Paragraph 10:

"That the said Sibbie P. Paysse was a bastard; that the father and mother of the said Sibbie P. Paysse had never been married; that the wife of the said Sibbie P. Paysse was a common woman, thereby meaning a woman of low virtue and morals; that the said Sibbie P. Paysse had his said wife in the family way before marriage and was compelled to marry her; that the said wife of said Sibbie P. Paysse was no better than a common whore, and that the wife of the said Sibbie P. Paysse came from a low and immoral house, thereby leading the said persons to whom the said defamatory words were spoken to believe and understand that the wife of the said Sibbie P. Paysse had been an inmate of a house of prostitution."

For answer the defendant denied all the allegations of the complaint. Upon the trial, the court instructed the jury, among other things, as follows:

"The slanderous words mentioned in any one of the following paragraphs of the complaint, that is, paragraphs 2, 3, 4, 5, 6, 7, 8, and 10, are, in the language of the law, libelous *per se*, that is, they are libelous and actionable in themselves, and the law implies that they were used, when spoken, if you find they were spoken as alleged in the complaint, with malicious intent to defame the character of the person or persons, of and concerning whom they were spoken, and express malice need not be proven. . . .

"The slanderous words mentioned in paragraph 9 in said complaint, are not libelous *per se* and are not actionable in themselves, and before you can find for the plaintiffs under the allegations of that paragraph 9 of the complaint, you must find that plaintiffs have proved by a fair preponderance of the evidence, that defendant spoke said words in said paragraph 9 and further that plaintiffs have been specially damaged thereby."

It is at once apparent that these instructions are contradictory, because the words alleged to have been spoken in paragraph 9, which the court tells the jury are not libelous *per se*, are in substance the same as the words alleged to have been spoken in paragraphs 3 and 8. The court had instructed the jury that the words alleged to have been spoken in paragraphs 3 and 8 were libelous *per se*, while words of the same purport, if not exactly the same, in paragraph 9 were not libelous *per se*. It is plain, therefore, that the court improperly instructed the jury upon these paragraphs.

The rule is that:

"Oral words charging a person with being a bastard are not actionable *per se*." 25 Cyc. 268.

See, also, *Hoar v. Ward*, 47 Vt. 657.

The respondents, upon the oral argument, conceded that this was the rule of law. It is clear, therefore, that the court erroneously instructed the jury with reference to paragraphs 3 and 8. The instruction was further erroneous with reference to paragraph 9, because it told the jury that there could be a recovery upon this paragraph if it was proved and they found that plaintiffs had been specially damaged. There are

no allegations in the complaint that there were any special damages, and no proof was offered upon that subject. The court, therefore, authorized the jury to find upon a question not presented in the record.

It is argued by the respondents that, in any event, the plaintiffs were entitled to recover, and that the jury were not misled by these instructions. Whether the plaintiffs were entitled to recover or not depended upon the view the jury took of the evidence upon these different allegations. The record conclusively shows that this action arose out of a family quarrel. The plaintiffs, Sibbie P. Paysse and Belle Paysse, are husband and wife. Sibbie P. Paysse is the stepson of the defendant, Mattie T. Paysse. The record shows that they had had numerous quarrels, and these slanderous statements, if spoken at all, were spoken on account of the unfriendly relations existing between the defendant and her stepson. The evidence upon the alleged slanderous statements was disputed, so that it was a question for the jury to determine whether or not these statements, or any of them, were in fact made by the defendant. When the court told the jury that certain of the statements were actionable *per se*, and that malice would be presumed, and that damages necessarily resulted, when such statements were not libelous *per se*, it is plain, we think, that prejudice must be presumed.

Furthermore, the verdict returned in the case was for $3,000. From the surroundings of the parties to this case, it is more than probable that this large verdict was based to some extent at least upon the conclusion that the statements contained in paragraphs 3 and 8 were libelous *per se*, and that some damages were awarded therefor. The defendant was clearly entitled to correct instructions upon the questions presented, and to instructions which were not contradictory in themselves. Contradictory instructions necessarily lead to confusion. Correct instructions clear up and make plain to the jury the issues which they are to determine.

For the reason that the instructions above noticed were contradictory, erroneous, and misleading, the judgment is reversed, and the cause remanded for a new trial.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12439. Department One. March 10, 1915.]

GEORGE BOUCKAERT, *Appellant*, v. STATE BOARD OF LAND COMMISSIONERS *et al.*, *Respondents*.[1]

INJUNCTION — WHEN ISSUES — REMOTE OR SPECULATIVE INJURY. Since an injunction will not be granted except against a clear case of material injury, and not to prevent purely speculative and theoretical injury, a writ of injunction will not be issued against the state board of land commissioners to prevent a reappraisement and public sale of certain tide lands (appropriated to a special fund the indebtedness against which was not a charge against the state) on the ground that warrants issued against the fund might become valueless or depreciated in case of any change in the appraised value of the lands, where it appears that the injury is remote or speculative.

Appeal from a judgment of the superior court for Thurston county, Claypool, J., entered April 27, 1914, in favor of the defendants, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief. Affirmed.

E. M. Farmer, for appellant.

The Attorney General and *R. E. Campbell, Assistant*, for respondent.

MOUNT, J.—This action was brought by the appellant to restrain the state board of land commissioners from taking any steps to appraise and sell at public auction certain shore lands on Lake Washington and Lake Union, for which awards of preference rights had been made and no payments made thereon, and offering the said lands for sale at public auction;

[1]Reported in 146 Pac. 848.

and, also, for an order compelling the defendants to accept and receive the amount of the original appraisement of said lands with the accumulated interest thereon. The defendants demurred to the complaint and the demurrer was sustained. The plaintiff thereupon refused to plead further, and a judgment of dismissal was entered. This appeal followed.

The only question is the sufficiency of the complaint. The complaint alleges, in substance: That the state of Washington was the owner of certain shore lands, and in the year 1907 passed certain acts which created a fund known as the Alaska-Yukon-Pacific Exposition fund, these acts being chapters 3, 4, and 5, of the Laws of 1907; that these acts set apart all the shore lands of the first class upon lakes Union and Washington, except certain lands dedicated to the university and the park board of the city of Seattle, and provided that these lands so set apart should be appraised and sold and the proceeds thereof applied to the use of the Alaska-Yukon-Pacific Exposition to the extent of one million dollars; and authorized warrants to be drawn against this fund, and provided that such warrants, and any indebtedness incurred by reason thereof, should be payable out of that fund, but should not be or become a general indebtedness against the state; that defendants are the agents of the state, whose duties and powers are to plat and appraise and sell these shore lands; that said acts gave the owners of uplands abutting upon said shore lands preferential rights to purchase the same, and provided that, in case of contest, interest should be charged upon the appraised value at the rate of 6 per cent per annum from the date of appraisement, this interest to be paid at the time the first installment of principal was paid; that on March 21, 1908, the defendants caused said shore lands to be platted and appraised for the sum of $1,000,000; that thereafter certain upland owners made application to purchase certain shore lands, and that shore lands appraised at the sum of $234,000 were claimed by contesting claimants; that these contests were subsequently

decided by the state board of land commissioners and appeals taken by the unsuccessful contestants to the superior court for King county, and that these appeals were still pending at the time of this action.

The complaint further alleges that warrants were issued against this appropriation in the total sum of $1,000,000, based upon the appraised value of the lands, and were sold and accepted by the purchasers thereof upon that basis; that this appraisement was made at a time when real estate values in and around lakes Union and Washington were the highest they have ever been in the history of the state; that since said date real estate values have greatly depreciated in that neighborhood; that the plaintiff is the owner of three warrants issued against this fund, the aggregate of which warrants amounts to $250 with interest; that on May 17, 1913, the board of land commissioners made and entered an order as follows:

"It appearing to the board at this time awards having heretofore been made by this board of preference right to purchase shore lands of the first class on Lake Washington in King county, that the persons to whom such awards have been made have failed to make the necessary payments and exercise the preference right of purchase;

"It is therefore ordered and determined that this board proceed on the 2d day of June, 1913, to take the necessary steps to appraise and sell at public auction those shore lands on Lake Washington for which awards of preference right have been made and no payments tendered and in the event of any applicant showing good cause prior to said date of June 2, 1913, why said shore lands should not be so appraised and sold, the board will consider the individual cases as they may arise.

"It is further ordered and determined, that the commissioner of public lands be, and is, hereby authorized and directed to notify these persons affected by the provisions of this order, of the action of this board as herein set forth, and that the attorney general of the state of Washington, be requested to have any and all appeals which are now pending affecting

the shore lands of Lake Washington dismissed for lack of prosecution."

The complaint then alleges that, prior to the entry of this order and subsequent thereto, and prior to the second day of June, 1913, many of said contestants had settled their differences and offered and tendered to pay to the board of state land commissioners the amounts due for such shore lands, together with the accumulated interest thereon, and demanded their contracts, but that said board of state land commissioners refused to accept the money and refused to issue the contracts, and declared their intention to be to reappraise said shore lands and establish a new appraised value thereon and sell the same at public auction; that said defendants are proceeding to take such steps as they deem necessary to have the appeals in the superior court for King county dismissed, and the preferential right to purchase cancelled; that by reason of the depressed market, it will be impossible to appraise said shore lands for as much as the old appraisal value, together with the accumulated interest thereon, and if an appraised value in excess thereof is placed upon the shore lands, there will be no purchasers therefor at the new appraised value; that the action of the board of state land commissioners if permitted to proceed will render the warrants held by this plaintiff, and all of the warrants issued against said fund, valueless or of uncertain value. These are in substance the allegations of the complaint.

It is argued by the appellant at length that these warrants were drawn against the special fund; that the statute declares that the indebtedness shall never become a general indebtedness against the state; and that any attempt at reappraisement of the lands will render the warrants held by the appellant of uncertain value. Conceding these facts to be true, it does not necessarily follow that this action can be maintained. For it is a common rule of law that,

"Courts do not seek to protect excepting against material injury, and purely speculative and theoretical injury cannot

ordinarily be redressed in the courts. Especially is this true when such redress is sought in a court of chancery by means of the exercise of the extraordinary powers of said court." *Wintermute v. Tacoma Light & Water Co.*, 3 Wash. 727, 29 Pac. 444.

In *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426, quoting from 1 High, Injunctions (3d ed.), § 22, we said:

"An injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity."

It is perfectly plain, from reading the complaint in this case, that the alleged injury, if any, is remote, speculative, and problematical. There is no urgent necessity shown for granting the injunction. The appellant, according to the allegations of the complaint, is the owner of three warrants drawn against this fund. The complaint shows that contracts have been entered into with the state for the sale of certain of these lands. It is not claimed by the appellant that the respondents are attempting to interfere with any of the sales or contracts which have already been entered into. On the other hand, the order made by the respondents and hereinabove quoted, recites that the board of land commissioners are attempting only to appraise and sell at public auction those shore lands for which awards or preference rights have been made and no payments tendered. All other contracts will be carried out according to the original appraisement and at the price for which contracts of sales have been made. It is purely imaginary to conclude that these warrants will not be paid in their order without any diminution of value. If these warrants shall be regularly paid, and we think there can be no doubt about it from the allegations of the complaint, then it is plain that the appellant in this case will not be injured. Furthermore, the complaint upon its face shows that of the persons who are claiming preference rights, even the contestants, in many cases, have settled their

differences and have offered and tendered to pay to the board of land commissioners the amount due for the shore lands, together with the accumulated interest. This upon its face shows that, even if a reappraisement shall be made, it will be equal at least to the amount which these persons are willing to pay for the lands. We cannot assume that the respondents would appraise these lands at a less value than the amount offered to be paid, nor at more than they will sell for.

There is an attempt in the complaint to show that, at the time of the appraisement, the value of these lands was the highest it has ever been in their history. If this is true, it is unreasonable to suppose that purchasers are willing at this time to tender the amount of that appraisement, with interest thereon, when an appraisement might be less than that amount. In other words, it is clear, from the allegations of the complaint, that the injury which may result to this appellant is remote and speculative. Furthermore, the complaint shows that certain of the contestants for preference rights have settled their differences, but it is not alleged that all of such contestants have settled their differences with reference to these rights. Appeals are therefore still pending. Until all of these appeals are dismissed, the board is not authorized to accept the purchase money which was offered by any contestant whose rights were not determined by the appeal.

It is unnecessary for us to determine in this case whether the state board of land commissioners have the right to reappraise the shore lands which have not been under contract of purchase, because a decision of that question is not necessary to a decision of this case.

It is plain to us that there is no clear showing of any injury to this appellant with reference to the payment of his warrants, and in the absence of such a showing, the court very properly sustained the demurrer to the complaint.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 12014. *En Banc.* March 11, 1915.]

ORILLIA LUMBER COMPANY *et al.*, *Appellants*, v. CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY *et al.*, *Respondents*.[1]

SALES—DELIVERY—TO CARRIER—CONSIGNMENT. Where the seller of a car of lumber took out a bill of lading, naming the purchaser as both consignor and consignee, and delivered the car to the railroad company, there was a delivery of the lumber to the purchaser.

SALES—RIGHTS OF PARTIES—WHEN TITLE PASSES—LACHES—BONA FIDE PURCHASERS. Upon a sale of a car of lumber upon condition that ninety per cent of the purchase price should be paid on delivery of the bill of lading, the general rule is that the title would remain in the seller until the payment is made; but the seller is guilty of such laches as to estop him from claiming title as against a *bona fide* purchaser from the consignee, where the seller took out a bill of lading naming the purchaser as both consignor and consignee, and delivered the car to the railroad company, and the seller's agent to collect the ninety per cent took the bill of lading and invoice to the purchaser's office, demanded payment, and left it there to be checked up, on the promise that it would be paid for at 1 p. m. of that day, at which time the purchaser refused to pay for the lumber or return the bill; this, on the theory that, of two innocent parties to suffer from the fraud of another, the loss should fall upon the one who has enabled the third person to do the wrong (overruling Id., 81 Wash. 611, 143 Pac. 152).

HOLCOMB, ELLIS, and CROW, JJ., dissent.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 13, 1914, upon findings in favor of the intervener, in an action of replevin, tried to the court. Affirmed.

Million & Houser and *George Friend*, for appellants.

Ernest B. Herald and *Wm. A. Holzheimer*, for respondents.

ON REHEARING.

MOUNT, J.—A petition for a rehearing was granted in this case, and a reargument was had to the whole court sitting

[1]Reported in 148 Pac. 850.

En Banc. The Departmental opinion will be found in 81 Wash. 611, 143 Pac. 152. The judgment of the trial court was there reversed, with directions to enter a judgment in favor of the appellant. The facts are fully stated in that opinion. It was there said:

"The single question presented by the appeal is, Did the respondent, a purchaser from the Page Lumber Company for value and without notice, acquire title? The general rule is that, where goods are sold upon condition that the price therefor shall be paid upon receipt of an invoice of the goods, the sale is for cash, and the title remains in the seller until the goods are paid for. This is true although the goods have been delivered to the consignee and sold by it to a *bona fide* purchaser without notice."

The statement of the general rule in the departmental opinion we are satisfied is too broad. It is broader than the statement of the rule in *Hirschorn v. Canney*, 98 Mass. 149, relied upon in that opinion. The rule as there stated is as follows:

"The sale and delivery of the goods by the plaintiffs to Eaton were on condition that he should send his notes in payment. As he did not perform the condition, the title did not vest in him; and it was settled in *Coggill v. Hartford & New Haven Railroad Co.*, 3 Gray 545, that in such case the vendee could convey no title as against the vendor, who had not been guilty of laches, to a *bona fide* purchaser. This doctrine has since been repeatedly affirmed."

The general rule is that if there is laches, waiver, or estoppel on the part of the seller, a subsequent *bona fide* purchaser for value acquires good title. We think this must necessarily be the rule. Otherwise a secret agreement between a purchaser and a seller would defeat the title to goods sold in the ordinary course. Of course this cannot be true. The reasonable rule is that, where the vendor knows the purchaser is offering the goods for sale and permits the vendee to sell the goods to an innocent purchaser who knows nothing of the contract between the vendor and the vendee, the innocent

purchaser will acquire good title, even though the goods are not paid for by the vendee upon the original sale. In a note to *McIver v. Williamson-Halsell-Frazier Co.*, 19 Okl. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 696, the author of the note there states:

"There is much conflict and confusion among the courts of the different jurisdictions as to the respective rights of the original vendor and a subsequent *bona fide* purchaser from the vendee, and much may be said both for and against the different doctrines enunciated and applied. One line of authorities, after holding that, under these circumstances, the buyer himself has acquired no title, applies the familiar and well-established doctrine that a purchaser of personal property, other than negotiable instruments, etc., from one who has the possession thereof, but no title thereto, does not acquire a title as against the true owner; and, therefore, holds that, the buyer having no title, a subsequent purchaser from him can obtain no better title, and will not be protected in his purchase as against the true owner, provided such owner is free from laches or fraud."

Further along in the same note, upon the question of the effect of the original seller's laches, it is said:

"The doctrine that a conditional delivery of goods sold, to be paid for in cash, will not pass title, even as against a third person, unless the vendors are guilty of laches, seems to be recognized; but it is held that it is the duty of the vendors to act promptly, otherwise, if the property reaches the hands of innocent third persons, they will be without remedy as against them, as the *indicia* of title with which they clothed the vendee by giving him possession raises the presumption that the sale was absolute."

And further along in the same note it is said:

"Many cases hold that, although, as to immediate parties to a contract of sale, a delivery conditioned upon payment of the purchase price as a condition precedent to passing of title will operate to prevent the title passing until the performance of the condition, yet, as to a *bona fide* purchaser for value and without notice, the seller is held to have no recourse."

In 4 R. C. L., p. 35, § 38, it is said:

"A bill of lading is transferable by the custom of merchants so as to vest the transferee with the title of the assignor, and since the assignee can take no greater title than that which existed in the assignor, it follows, as a general rule, that a *bona fide* purchaser under a defective title cannot claim the property described in the bill of lading as against the true owner. Where, therefore, one who has no title to goods shipped transfers a bill of lading to a *bona fide* purchaser for value the title to the rightful owner is not thereby divested, and this rule is applicable to a *bona fide* assignee who has advanced money in the faith of a bill of lading which covers goods to which the consignor did not have title. A bill of lading can be transferred, however, so as to vest title or right in the transferee only by the person to whom it is issued by authority. If transferred by an unauthorized stranger, the *bona fide* transferee cannot claim any damages from the carrier for the injury he may have suffered thereby. And so pursuant to the rule, it has been held that a *bona fide* purchaser for value, takes the legal title to property covered by a bill of lading on assignment thereof, free from any adverse claims against the assignor of which such purchaser had no notice; and moreover, that a *bona fide* purchaser's title, so acquired, cannot be disturbed or divested by a misappropriation or conversion by the assignor of funds paid to him as consideration for such assignment. But in the application of the rule first above stated, if the true owner is not without fault, as where he furnishes another with *prima facie* evidence of a power of disposal, he will be bound by the latter's sale to a *bona fide* purchaser. That the rule is not without difficulty, and very strong and plausible opposition, is evident from the fact that many of the decisions hold to the reverse doctrine and declare that a *bona fide* transferee of a bill of lading who purchases from a fraudulent vendee, for value, will obtain a title to the goods paramount to that of the original vendor."

In this state this court, in the case of *First Nat. Bank of Pullman v. Northern Pac. R. Co.*, 28 Wash. 439, 68 Pac. 965, held, that where a carrier issues a bill of lading for goods delivered to it for shipment, it should demand and receive the

bill of lading before delivering the goods, in order to avoid liability. In speaking to this question we said, at page 443:

"The principle stated by Judge Cooley on Torts, page 456, that a mere bailee, whether common carrier or otherwise, is guilty of no conversion though he receive property from one not rightfully entitled to possession, and, acting as a mere carrier, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner, is suggested as pertinent to this controversy. In the absence of statutory definition and regulation of bills of lading, the deductions made from the very numerous authorities adduced by counsel for appellant, which exonerates the carrier from liability in an ordinary contract when delivery is made to the consignee, may be conceded. Primarily a bill of lading or receipt is not necessary to constitute the contract. The delivery of commodities to the common carrier, with the designation of the person and place of shipment, is all that is requisite. Custom and the law fix the responsibility and liability of the carrier. The presumption then is that the consignee is the owner, and, without notice to the contrary, the carrier may safely make delivery to him. It seems from an examination of a large number of cases involving the nature of bills of lading made by a common carrier that the custom very generally exists of shippers selling or assigning such bills of lading and receiving payment therefor and advances upon the same. The custom enables the shipper to receive immediate payment from his local bank. The usage materially aids and stimulates trade and commercial transactions. It enables the small shipper or producer to realize upon agricultural products, such as wheat, at the most favorable market prices."

The goods in this case were delivered by the Orillia Lumber Company to the railway company. The Page Lumber Company was named in the bill of lading as the consignee. The Page Lumber Company was also named as the consignor. If the goods had been lost in transit, it is plain that the railway company would have been liable to the Page Lumber Company therefor, because the loading of the lumber in the car and taking the bill of lading in the name of the purchaser constituted a delivery to the purchaser. *Whitman Agricul-*

tural Co. v. Strand, 8 Wash. 647, 36 Pac. 682; *Roy v. Griffin*, 26 Wash. 106, 66 Pac. 120; *Izett v. Stetson & Post Mill Co.*, 22 Wash. 300, 60 Pac. 1128; *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131.

While there is conflict among the authorities upon the question, we think the great weight of authority is to the effect that, where goods are sold upon condition that the price therefor shall be paid upon receipt of the invoice of the goods, the title remains in the seller until the goods are paid for, unless the original vendor is guilty of laches, or by some act has waived his right, or is estopped from claiming that the sale is one for cash. In the case of *Wigton v. Bowley*, 130 Mass. 252, it was said:

"In the sale of specific chattels, an unconditional delivery to the buyer or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, is sufficient to pass the title, if there is nothing to control the effect of it. If the bill of lading or written evidence of the delivery to a carrier be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer the property to the vendee. *Merchants National Bank v. Bangs*, 102 Mass. 291. If the vendor intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs."

That was said in a case where a carload of flour was ordered at an agreed price to be delivered on board the cars, and the vendor was authorized to draw upon the vendee for the amount at ten days' sight. When the flour was shipped, a receipt was taken in the name of the vendee, who was also named as the consignee. A draft was sent for collection, with directions to deliver the receipt to the vendee upon his accepting the draft. The draft was not accepted and was returned to the vendor. It was there held, in an action by the vendor for the conversion of the flour against a person who had purchased from the vendee in good faith and who had obtained

possession of it, that the title to the property had passed to the vendee when it was delivered to the railroad company for transportation.

In *Michigan Central R. Co. v. Phillips*, 60 Ill. 190, there was a contract which provided for cash on delivery. The seller took the goods to the buyer's premises, but there was no one there to pay. The seller left the goods with some one in charge of the buyer's premises, and stated that he would call in the morning and get his pay. Before he called the next morning the buyer shipped the goods and obtained a bill of lading which he disposed of to an innocent purchaser. The court there said:

"The property here, where nothing remained to be done to complete the sale, either to identify the property or ascertain the price, was entrusted to the possession of the purchaser by the consent of the owner, under the form of a regular sale and delivery, and in the completion of the same; and by its being thus placed under his control, Ames was enabled to obtain credit by pledging it to an innocent party.

"The sellers did not see fit to exact payment at the time, as they might and should have done, where rights of innocent purchasers might intervene, but trusted to the personal security of Ames till the following morning; and the consequence of this misplaced confidence should be borne by them rather than that the bank should be the sufferer by it. It is an instance for the application of the familiar rule, founded on sound reason, that where one of two innocent persons must suffer from the fraud of a third, the loss should fall on him who, by his imprudence, enabled such third person to commit the fraud."

In *Hall v. Hinks*, 21 Md. 406, the court said:

"This rule rests upon the well established principle of equity, 'that when one of two innocent persons must suffer by the fraud of a third, the loss shall fall upon him, who has enabled such third person to do the wrong.' "

In that case the Maryland court further said:

"An examination of the authorities, and a careful consideration of the subject, have led us to the conclusion that the

same rule applies; and that a *bona fide* purchaser, without notice of the condition upon which his vendor has acquired the possession, will be protected against the claim of the original vendor, in the same manner where the sale and delivery are conditional, as where the possession has been obtained by fraud. It seems to us, the same equitable principle lies at the foundation of the rule, and is equally applicable to both classes of cases.

"If a party purchase goods for cash, and they are delivered to him upon the condition that he shall pay for them on delivery, he perpetrates a fraud by selling them to another before complying with the condition; but if the person to whom he sells deals with him in good faith, ignorant of the secret defect in his title, and pays value, it is difficult to see why, upon the principle before stated, the innocent purchaser ought not to be protected against the claim of the original vendor, who, by his own act, has enabled his vendee to perpetrate the fraud."

In the case of *National Bank of Bristol v. B. & O. R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. 321, it appears that Atkins Brothers sold to DeCamp a car of lumber. A bill of lading was issued in which DeCamp was named both as consignor and consignee. In payment for the lumber, DeCamp gave to Atkins Brothers a check which was dishonored. DeCamp assigned the bill of lading to the plaintiff bank. When the check was dishonored, Atkins Brothers gave a bond to the defendant railway company and recovered the lumber. The bank then sued the railway company. It was there held that the plaintiff was entitled to recover as it was in the position of an innocent purchaser, having bought on the strength of a bill of lading. After discussing at length the effect of the transfer of a nonnegotiable bill of lading, the court said, at page 680:

"The more modern rule upon the subject under consideration seems to be, that where the owner of things in action, although not technically negotiable, has clothed another to whom they are delivered in the method common to all mercantile communities with the usual apparent *indicia* of title, he will be estopped from setting up against a second assignee

to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute.

"We have said that the bank acquired by the assignment of the bill of lading precisely the title that DeCamp had to the lumber on the day the transfer was made. But it is insisted that DeCamp obtained possession of the lumber by fraud and therefore that he got no title to it at all and consequently could give none to the bank. If it be conceded that he did secure the lumber by fraud, still if the bank was ignorant of the fraud and took the bill of lading in good faith and for value it acquired an unassailable title, even as against the defrauded vendor. That proposition has been distinctly settled in *Hall v. Hinks et al.*, 21 Md. 417. . . . If the jury should believe that the bank acted in good faith in discounting the draft for DeCamp and accepting the bill of lading as collateral security, and if Atkins Brothers, by putting it in the power of DeCamp to deal with the property as his own enabled him to mislead the bank, and if in consequence of their confidence in him and the credit of one day which they gave him a loss must fall either upon the bank or upon them, then, wholly aside from all questions respecting the negotiability of the bill of lading, the doctrine imposes the loss upon the persons by whose carelessness DeCamp was enabled to represent to the bank that the property was his, that loss thus occasioned by that representation, must fall upon them."

Many other cases might be cited and quoted from to the same effect. The general and equitable rule is that when one of two innocent persons must suffer, that one must suffer who has placed it in the power of a third person to do the wrong. In this case, as we have seen above, it is conceded that the Orillia Lumber Company loaded the lumber upon the car of the railway company and a bill of lading was issued at its request to the Page Lumber Company. Therefore, so far as any person dealing with the bill of lading was concerned or could have known, the Page Lumber Company was both the consignor and the consignee of the lumber. In short, the lumber was delivered to the Page Lumber Company at the time it was loaded upon the car. There was nothing upon the bill

of lading to indicate that the Orillia Lumber Company had any interest in the lumber. Any person purchasing the lumber upon the authority of the bill of lading would not have known that the Orillia Lumber Company had any interest in the lumber whatsoever. It seems plain, therefore, that this was such laches as would estop the Orillia Lumber Company from obtaining the lumber from an innocent purchaser for value and in good faith. In *Security State Bank v. O'Connell Lumber Co.*, 64 Wash. 506, 117 Pac. 271, we said:

"When property designed for sale is loaded onto a car by a vendor, and he takes the bill of lading in his own name, a sale or delivery will not be presumed; for the bill of lading becomes a symbol of property or, as Mr. Benjamin calls it, 'a document of title,' and the title will not ordinarily pass until the bill of lading is surrendered."

In *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 58 Wash. 302, 101 Pac. 877, it was said:

"It is true that the books speak of the bill of lading as a symbol of the property, and statements are found to the effect that a delivery of the bill of lading is a symbolic delivery of the property, and a transfer of such property to the holder of such bill of lading. We apprehend that the true meaning of this language is that such delivery by the consignor only operates as a transfer of property or some interest in it when there is a stipulation in the bill itself whereby an ownership is retained in the consignor. It would certainly involve an absurdity to say that, where the goods are consigned to a named consignee, title passes to such consignee, and at the same time to announce that an indorsement or delivery of such bill to a third party by the consignor passes an interest in the property. It is only a symbol of the property where the consignor upon the face of the bill reserves an interest."

In this case, if the Orillia Lumber Company desired to reserve any interest in the property shipped, it could easily have done so by having the bill of lading made out in its name, or a note or memorandum made upon the bill of lading stating the terms of sale. Instead of this, the consignor billed

the lumber in the name of the consignee, so that the bill of lading showed upon its face that the lumber was shipped by the consignee to itself. This bill of lading was left in the possession of the Page Lumber Company, the bearer no doubt trusting upon the security of that company. It was by the use of this bill of lading that the Page Lumber Company was permitted to perpetrate the fraud, if there was fraud. It seems plain under these facts that the innocent purchaser for value should not suffer the loss, but that the loss should fall on the one who by imprudence made the fraud possible.

It is true this court held in *Rumpf v. Barto*, 10 Wash. 382, 38 Pac. 1129, that where goods were delivered to a person under an agreement that the goods were sent merely for inspection, and to be returned upon demand, where the goods were sold, the owner of the goods might recover them. But in that case it was said that neither party was in any way in fault; and in such a case the legal owner was entitled to the possession. The facts in that case are not controlling here, because the goods involved in that case were in effect stolen, and the rule of stolen goods was applied.

We conclude that the judgment of the trial court was right, and it is therefore affirmed.

MORRIS, C. J., PARKER, and FULLERTON, JJ., concur.

MAIN and CHADWICK, JJ. (concurring)—We concurred in the original opinion in this case, but upon a reargument, and a fuller consideration of the authorities, we have become convinced that the right result was not there reached. Upon the first hearing, too little consideration was given to the fact that the lumber had been delivered to the carrier and the bill of lading taken in the name of the Page Lumber Company as both consignor and consignee; and the legal effect of the situation thus presented when the rights of a purchaser from the Page Lumber Company, for value and without notice, are involved. Had the bill of lading been taken in the name of the Orillia Lumber Company, and by that company indorsed

in blank, a different situation would be presented, and the views expressed in the original opinion would be apposite. We therefore concur in the opinion expressed by Judge Mount.

HOLCOMB, J. (dissenting)—I dissent. The opinion of Judge Gose upon the original hearing (81 Wash. 611, 143 Pac. 152), is invincible. It states the law correctly, applies the same accurately to the facts in this case, and decides the case justly. No principles of law or justice are subverted or disregarded therein.

Too much importance is attached by the majority of the court in the present decision to the weight and effect of a bill of lading. The proposition is simple. A common carrier is bound to receive for carriage goods delivered to it by any one, whether owner or thief, for carriage to a given destination. It issues to the shipper a bill of lading which has two aspects: First, it is a receipt for the goods to the shipper; and second, it is a contract to carry said goods to the destination and deliver the same to a named consignee. The bill of lading constitutes a symbol of possession of the goods, but not a muniment of title, nor does the statute make it so. If it were so, then a thief could divest the real owner of title and pass a lawful title to portable goods by merely stealing the goods, delivering them to a common carrier, and obtaining its bill of lading therefor to a named consignee other than the true owner. So the present majority opinion gives to one who obtains no title to or right of possession of personal property, but merely obtains possession of the paper symbol or substitute therefor without authority, the power to pass valid title to the property by merely transferring the paper substitute to another. No such thing was ever known in the law. If that can be done, then as was said in *Hirschorn v. Canney*, 98 Mass. 149: One who obtains possession "of a horse to go on a journey can make a valid sale of the horse. If he has no title, *how can he communicate one?*"

The proposition is advanced that appellant was guilty of laches, and that in such case the rule applies that "when one of two innocent persons must suffer by the fraud of a third, the loss shall fall upon him who has enabled such third person to do the wrong." How can it be said that appellant was guilty of laches? What more could it have done? In the first place, as stated by Judge Gose, it "did the usual thing—presented the bill of lading and invoice for payment; and the bill of lading was retained against its protest, and payment refused." "There was not only no intention to deliver the bill of lading, but there was no delivery." Neither was there any delivery of the thing itself, the lumber. Immediately after the Page Lumber Company had refused to pay the ninety per cent of the invoice price and refused to return the bill of lading, appellant unloaded the lumber from the car. The railroad company, against the protest of appellant, reloaded the lumber and moved the car to Seattle. The appellant followed it up, replevined it, and sold it. What more could have been done by appellant to protect its rights? The lumber itself, the real *res*, never did get into possession of the vendee or its innocent purchaser. All that either of them ever had was the paper substitute. On the same theory, it would be the imprudence of an owner of a horse, borrowed by a dishonest person to go upon a journey and sold by the dishonest one instead of being returned, which would be at fault by loaning the horse and putting it into the possession of the borrower. On the same theory, the "stolen goods" doctrine, mentioned in the majority opinion, would in most cases fail of its effect, for it would be found that the imprudence of the owner in putting the goods where they could be stolen gave an innocent purchaser from the thief title to the property. In fact, the reasoning of the majority refutes itself upon every point.

The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his

possession. 4 Ruling Case Law, § 39; *Shaw v. Railroad Co.*, 101 U. S. 557. And the same rule applies in a case where the bill of lading was procured by the fraud of the assignor. *Decan v. Shipper*, 35 Pa. St. 239, 78 Am. Dec. 334.

The judgment should be reversed as before.

ELLIS and CROW, JJ., concur with HOLCOMB, J.

[No. 12294. Department One. March 12, 1915.]

ANDERSON STEAMBOAT COMPANY, *Appellant*, v. THE COUNTY OF KING *et al.*, *Respondents*.[1]

FERRIES—RIGHT TO USE—GRANT. Rem. & Bal. Code, § 5013, providing that a county may "operate and maintain . . . a ferry . . . together with approaches and landings . . . appertaining thereto," for tolls, is an exclusive grant to use shore lands, belonging to the state, for the purpose of a wharf and approaches to the ferry connecting with a public highway laid out along the shore.

WHARVES — PUBLIC WHARVES—USE FOR FERRY. A county's use of a wharf and approaches for a ferry, under a grant from the state, in its proprietary capacity as licensee of the state, does not make the wharf and approaches a public dock.

FERRIES—APPROACHES—PUBLIC HIGHWAYS—PRESUMPTION. The presumption that a street converted into a ferry approach by a wharf, is a public highway, may be rebutted, and is overcome where the wharf was constructed by the public for a ferry approach incidental to a franchise right to maintain the ferry.

HIGHWAYS—EXTENT—WATER BOUNDARIES. Where a highway is laid out along a shore, following the shore line, there is no constructive extension of the street into the water, although it touches the water at intervals.

WHARVES—PUBLIC WHARVES—PRESUMPTION. Where a wharf is used in a proprietary capacity as an approach to a county ferry, and the wharf is constructed on state lands to connect with a public highway running along the shore, opposite to an intersecting state highway terminating in but not extending beyond the shore road, there is no presumption of a common right of user, and the wharf is not a public wharf.

[1]Reported in 146 Pac. 855.

SAME—PUBLIC CHARACTER—USE OF PUBLIC FUNDS. The public character of such a wharf and ferry approach cannot be determined by reference to the fact that the county has paid for it and its upkeep from the road and bridge fund; since an unlawful diversion of county funds does not affect the character of the county's ownership and use of the wharf and ferry approach.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 18, 1914, upon findings in favor of the defendants, in an action to enjoin interference with the operation and landing of plaintiff's boats, tried to the court. Affirmed.

Byers & Byers and *Vince Faben*, for appellant.

John F. Murphy and *Samuel Morrison* (*W. H. White*, of counsel), for respondents.

CHADWICK, J.—The appellant and its predecessors have maintained a line of steamers on Lake Washington for nearly thirty years. One of its principal routes and a material part of its business has been between the east end of Madison street, in the city of Seattle, and the town of Kirkland, on the east shore of Lake Washington. The streets in the town of Kirkland run east and west and north and south. There is a street along the shore of the lake adjacent to the line of ordinary high water and the shore lands belonging to the state of Washington. It is intersected on its east line by the streets of the town. Its west line is unbroken.

In 1895, the legislature passed an act authorizing any county to construct and maintain "a ferry across any unfordable stream adjoining and within one mile of the limits of such city or town, together with all necessary grounds, roads, approaches and landings necessary or appertaining thereto . . . with full jurisdiction and authority to manage, regulate and control the same . . . and to operate the same free or for toll." Laws 1895, p. 341. Within a short time thereafter, the county of King, acting under the statutory grant, began the erection of a ferry, and

built an approach and wharf or landing leading at a slight angle to an intersecting street or road running east and west through the town of Kirkland, now known as the Redmond road, or state aid road No. 287. In 1899, the legislature passed an act enlarging the grant of 1895 so that the county might maintain a ferry across any "lake, estuary or bay within or bordering on said county, together with all the necessary boats, grounds, roads, approaches and landings necessary or appertaining thereto." Laws 1899, p. 39 (Rem. & Bal. Code, § 5013).

The county has maintained a ferry since 1898, over the same route. The record does not disclose the contrary fact, and we therefore assume that the streets of the town of Kirkland have never been extended and platted over the abutting shore lands. The approach at the Kirkland landing is a wharf about twenty-four feet wide up to a point where the county has erected gates to control the movements of passengers to and from the ferry, then terminating in a U-shaped curb or slip for the ferry boat. The wharf is inclosed by a railing. A "bull rail" divides the wharf into two sections so as to protect foot passengers from the hazards of wheel traffic.

About fifteen months before the beginning of this suit, appellant, with the knowledge and unofficial consent of two of the county commissioners, began to land its boats at the wharf and to compete for the traffic accumulating at that point. It cut the railing and the bull rail and built a slip so that passengers and wheel traffic could be taken aboard its boats. Prior to the time it began to use the wharf or approach, it landed its boats further south at a point known as the Market street dock. There is testimony tending to show that the receipts of the county ferry were diminished by reason of the fact that appellant's boats were landing at the ferry dock, and that the already deficient income of the ferry was lessened thereby. A short time prior to the commencement of this action, the county commissioners served a

notice upon appellant that it could no longer use the wharf for the accommodation and landing of its boats. This warning being unheeded, the county sent its agents onto the dock and replaced the railing and the "bull rail" which had been removed; whereupon appellant brought suit, praying that respondent be restrained from further interfering with the operation and landing of its boats. After a trial on the merits, the court found with the county on its cross-complaint, and enjoined appellant from further use of the wharf.

It is the contention of appellant that the dock is a public wharf open to all users; that a dock may be public or private, depending upon the character of its use; that the present dock is at the termination of a public highway and has been used by the public ever since it was erected, without let or hindrance; and as a further reason for determining its character as a public dock, it is urged that it has been paid for out of the road and bridge fund of the county, which latter circumstance, when coupled with the power of the county to build and maintain docks, Laws 1903, p. 20 (Rem. & Bal. Code, § 8114), makes the holding that the wharf is a public dock imperative and demands a reversal of the case. The rule relied on is thus stated:

"The question whether a wharf is public or private depends upon the purpose for which it was built, the uses to which it has been applied, the place where located, and the nature and character of the structure. When a public highway is laid out to navigable waters, its termination is presumed to be a public landing as incident to the highway." Gould, Waters (3d ed.), § 119.

See, also, *Compton v. Hankins*, 90 Ala. 411, 24 Am. St. 822, 9 L. R. A. 387; *City of Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 82 N. E. 513, 16 L. R. A. (N. S.) 506.

It is the contention of the county, in so far as it is necessary to notice its contentions, that the wharf was built for its own uses as a part of the ferry; that it is no more than an approach; that it is operating its ferry in a proprietary

capacity as a licensee of the state; that it is collecting tolls and is entitled to the unhindered use and enjoyment of its franchise and the exclusive use of all of its incidents. It will be seen, therefore, that a right decision depends upon an answer to the question whether the approach or wharf is a part of a highway. It seems to us that the statute is conclusive. Under it the county is authorized "to . . . construct . . . operate and maintain a ferry . . . together with . . . approaches and landings . . . appertaining thereto."

As stated, appellant contends that the wharf is a continuation of the street known as the Redmond road, or state aid road No. 287, and that the county cannot claim an exclusive interest in the dock or in any part of it, other than that part which is inclosed by the fence at the end of the dock. This conclusion does not follow. The shore lands of the state belong to the state of Washington and can be disposed of by the state in any way it sees fit to dispose of them. It may grant an exclusive use; indeed, all of the laws pertaining to the lease and sale of shore lands give or imply the right of exclusive use and enjoyment.

A dock or wharf is not ordinarily held to be a part of a public highway (*State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913 E. 1076), and although it be that a street converted into a ferry approach by means of a wharf is presumed to be a highway, the presumption, like all presumptions of fact, is only a rule of evidence shifting the burden of proof; and when it is made to appear that the wharf has been constructed and maintained by the public as a ferry approach, it follows that it is incidental to the franchise right. In legal contemplation, the ferry ends upon the ground, and not at the outer edge of a wharf which is made necessary on account of the waters being too shallow for navigation or for other reasons.

A ferry, whether operated under a license or a statute, is, in a sense, a monopoly, and although the power is in the state

to permit the operation of a ferry over the same route, that right will not be implied. It depends upon express grant.

"In this country ferries are established by legislative authority, which is exercised either directly, or by a delegation of powers to courts, commissioners, or municipalities." *Appeal of Douglass*, 118 Pa. 65, 12 Atl. 834.

See, also, *Mills v. St. Clair County*, 8 How. 569.

We only advert to the property and franchise rights of the county to emphasize the fact that the character of the approach must be determined by the whole spirit of the law, and that it cannot be considered a part of a highway without destroying the purpose of the law as well as the intended uses of the grant. We have no purpose to pass upon the challenged right of appellant to engage in traffic between Madison street and Kirkland, being itself without a license. That question is not necessarily involved. To discuss it would require an examination of the laws and rules of navigation. It may be reserved for future consideration.

Furthermore, it has been held that where, as in this case, a highway is laid out along a shore, following the line of the shore although it may come in contact with the water at intervals, there is no constructive extension of a street into the water. This exception to the rule that a highway laid out to a navigable stream presumptively terminates at a public landing and may be so used by the whole public, is noticed by Mr. Gould, Waters (3d ed.), § 119.

"Where a highway is laid out to navigable water and there terminates, the terminus may be regarded as presumably intended for a public landing as incident to the highway.

"Where, however, a highway, running from place to place, is laid out along the shore of a navigable stream and in immediate contact with it for a considerable distance, the reason for the presumption does not exist." Syllabus, *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186.

So in this case, the right to use the shore or shore lands at all depends upon some statute or contract, and no presumption of a right of common user arises from the fact that a

wharf or dock, put to private uses or used by the public in the prosecution of a proprietary function, is erected opposite to a street terminating in, but not extending beyond, the shore road.

Again, whether the wharf is a public highway depends upon the title to the soil as well as upon its use. The title to the shore lands, in so far as this record shows, is in the state, and can only be platted under its authority. Const., art. 17, § 1; Rem. & Bal. Code, § 6746 (P. C. 477 § 131). It follows that neither manner of use nor time of use would make the approach to the ferry a public highway or defeat the right of the proper authorities to extend the streets of the town over the shore lands, even in disregard of all present improvements. If the public has no right to assert that the wharf is a highway—and assuredly it cannot, for there is no title to sustain it—it is certain that appellant can claim no such right. It has asked, and of course can receive, no more than every other person or legal entity can rightfully claim and sustain in law.

Appellant earnestly contends that the character of the dock or approach must be determined by reference to the manner in which it has been paid for and maintained. We may admit, for the sake of argument, that the dock has been paid for and that its upkeep has been made a charge upon the road and bridge fund, but that is a question that does not concern appellant. If the commissioners of the county are unlawfully diverting the general funds of the county, there is a way to restrain them. The character of the county's ownership and use of the dock would not be affected thereby. The fact that property is paid for out of a misappropriated or diverted fund does not fix title in the fund. Title depends upon the statute. In this case, the county has no more than a permission to use state shore lands in which the public has no interest except as they become patrons of the ferry.

Appellant further contends that boats have landed at the dock since it was built and that it has been used, not only by appellant company, but by others for general commercial purposes. This may be true, but the use was permissive. The users were no more than licensees. There was nothing given up or surrendered by them. The license operated to their benefit and advantage. And from the nature of things there can be no estoppel. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 345.

The decree of the lower court is affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

[No. 12314. Department One. March 12, 1915.]

JAMES E. FAUCETT, *Respondent*, v. NORTHERN CLAY COMPANY, *Appellant*.[1]

SPECIFIC PERFORMANCE—CONTRACTS—CERTAINTY. The rule that specific performance of an executory contract will not be decreed unless all its terms are certain does not apply to a contract partly executed which by its terms can be made certain.

LANDLORD AND TENANT—LEASE—CERTAINTY—TERM TO BE AGREED UPON—"YEARLY RENTAL" — SPECIFIC PERFORMANCE. A contract of lease providing for a renewal at a "yearly rental" at a rent to be agreed upon or fixed by arbitration, for a term to be agreed upon, is not so uncertain as to warrant refusal of specific performance; since a term at a "yearly rental" was for at least two years; and the court could fix a reasonable term under all circumstances, if either party captiously refused to do so; especially in view of partial performance, and valuable consideration to the lessor in regard to the use of the land for factory purposes, and agreements by the lessee to restore the land to its original condition upon abandonment or termination of the lease, with the right to remove all improvements.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 6, 1914, in favor of the

[1]Reported in 146 Pac. 857.

plaintiff, upon dismissing defendant's cross-complaint, in an action for equitable relief, tried to the court. Reversed.

Paul B. Phillips and *I. B. Knickerbocker* (*Milo A. Root*, of counsel), for appellant.

M. E. Brewer and *Jno. Mills Day*, for respondent.

CHADWICK, J.—On January the 24th, 1910, the respondent and appellant entered into a contract of which the following is a copy:

"It is agreed between James E. Faucett, a bachelor of Auburn, King county, Washington, and the Northern Clay Company, a corporation of the city of Auburn, that in consideration of the mutual agreements of said parties:

"(1) James E. Faucett consents to the sub-leasing of the tract of land hereinafter described from Buichiro Itabashi, a Japanese of said city of Auburn to said Northern Clay Company until and including the 8th day of March, 1914, and said James E. Faucett waives the covenants in his lease to said Buichiro Itabashi, dated March, 1909, so far as the same require the said Buichiro Itabashi or his assigns to till and cultivate the premises hereinafter described and to keep the same in grass and pasture. The land herein referred to lies in King county, Washington, and is bounded and described as follows, to wit: [Description omitted.]

"(2) The Northern Clay Company agrees in consideration of the foregoing agreement on the part of said James E. Faucett to pay to said Faucett any and all increase in the amount of taxes that may hereafter be levied against the property which it so subleases over and above the rate of taxation thereon for the year 1908, up to and including the 8th day of March, 1914, and further agrees to defend any and all suits or actions at law against said James E. Faucett that may arise by reason of said subleasing of the above described premises to said Northern Clay Company, and to pay all damages, if any, that may be adjudged against said James E. Faucett in said action.

"(3) If on or before the expiration of said sub-lease on the said 8th day of March, 1914, the said Northern Clay Company shall desire to abandon its occupancy of the above described premises then it shall forthwith remove from said

premises all improvements thereon placed by it, and shall, at its own expense restore said premises to a cultivable condition as good and satisfactory as at the time of signing this agreement, and shall, in such event, deliver peaceable possession of said premises to said James E. Faucett, his heirs, executors, administrators or assigns upon or before said 8th day of March, 1914.

"(4) Upon the expiration of said sub-lease on March 8, 1914, the said Northern Clay Company may purchase the said land without the improvements from said James E. Faucett, his heirs, executors, administrators or assigns upon his or their consent and agreement thereto, at such price and upon such terms as may be agreed upon between the parties to such sale and purchase.

"(5) If upon the expiration of said sub-lease on March 8, 1914, the said James E. Faucett, his heirs, executors, administrators and assigns shall decline to sell said land to said Northern Clay Company, or if the Northern Clay Company shall not purchase at said time, then said Northern Clay Company shall have the right to require a lease from the said James E. Faucett, his heirs, executors, administrators or assigns from thence forward for such period as may then be agreed upon, at a yearly rental then to be agreed upon between the contracting parties: Provided that in any event such lease shall be given to said Northern Clay Company only if it shall then continue to use said premises or other contiguous land for factory purposes. If the said Faucett, his heirs, executors, administrators or assigns, and the Northern Clay Company, its successors or assigns, shall not be able to agree upon a rental value of said premises, then each of said contracting parties shall appoint an arbitrator, and the two arbitrators so appointed shall choose a third arbitrator, and the three arbitrators so appointed shall determine the fair and reasonable rental value of said premises without the improvements, and the said contracting parties shall abide by their decision.

"(6) At the expiration of such second lease as mentioned in the preceding section of this agreement, the Northern Clay Company, its successors or assigns shall have the absolute right to purchase said premises from said James E. Faucett, his heirs, executors, administrators or assigns at the price and upon the terms to be then agreed upon between

them: Provided that if the contracting parties to such sale and purchase shall be unable to agree upon the value of the same, then each of said parties shall appoint an arbitrator, and the two arbitrators so appointed shall jointly select a third arbitrator, and the three arbitrators so chosen shall determine the fair and reasonable value of said land without the improvements, and the said contracting parties shall abide by their decision.

"(7) If, on or before the expiration of the said second lease described and provided for in paragraph 5 of this agreement, the said Northern Clay Company, its successors or assigns shall desire to abandon the above described premises without purchasing the same, it shall remove therefrom all improvements thereon forthwith, and shall, at its own expense restore said land to a good and satisfactory cultivable condition and shall thereupon surrender peaceable possession of said premises to said James E. Faucett, his heirs, executors, administrators or assigns.

"Dated at Auburn, Washington, January 24, 1910. James E. Faucett, Northern Clay Company, By Paul S. MacMichael, President."

Appellant took possession under a sublease from the then tenant and fully performed in so far as the first period, that is to say, until the expiration of the lease to the Japanese, the time fixed for a renewal. Appellant paid the Japanese a bonus of $250 for the privilege of taking immediate possession, and used the land as a part of its factory site. Appellant offered to prove that it made valuable improvements upon its own property adjoining, in virtue of the lease, approximating in value $20,000. For the purposes of this opinion, we may rightfully assume that, whatever the value may have been, appellant did make valuable improvements. Just before the expiration of the sublease, appellant notified the respondent that it elected to purchase the land as provided in paragraph four of the lease. Respondent refused to sell the land or any part thereof, whereupon appellant demanded that it have a lease for a continued term, to be agreed upon between the parties as provided in para-

graph five of the lease, and that thereafter it be allowed to purchase the land as agreed upon in paragraph six. The parties negotiated for some time between themselves, but failing to come to an amicable adjustment of their differences, respondent brought this action praying for a cancellation of the contract; that he be given possession of his land, and that his title be quieted as against any claim of interest whatever on the part of the appellant.

Respondent claims that he was fraudulently overreached by the appellant; that the contract as written does not express the contract entered into between the parties; that there was no contract of sale; that he is an ignorant and illiterate man; that he cannot read and write; and that he was not informed of the true terms and character of the contract until after appellant had made a demand for a deed when the sublease from the Japanese was about to expire.

The case came on for trial with issue joined upon all of the material allegations of the complaint and a prayer on the part of appellant for specific performance, when the court held, upon its own suggestion, the suggestion being thereafter incorporated by way of amendment, that the contract was uncertain and incapable of performance and for that reason no recovery could be had. The issue of fraud was not tried out by the court.

Respondent submits a quotation from 36 Cyc. 587, 590:

"The contract must be complete in all its parts; that is to say, it must contain all the material terms, and none of these terms must be left to be settled by future negotiations. It must also be certain; that is to say, each of the material terms must be expressed with sufficient clearness and definiteness to enable the court to ascertain the intent of the parties and to frame its decree in accordance with such intent. The court cannot make a contract for the parties, *ex aequo et bono*. . . .

"An action at law for breach of contract can often be maintained, although some of the terms of the contract are

not established with exactness. It is otherwise where specific performance is required. The court, in order that it may frame a decree in accordance with the intent of the parties, must be clearly apprised of that intent in all essential respects. A greater degree of certainty is required than in actions at law for damages."

This rule is thoroughly established, and if the facts bring the action within it, it would be controlling; but we are of opinion that, whatever the rule may be if applied to an executory contract, it does not apply in its fullness to a contract that is in part executed and which cannot only be made certain, but which by its terms provides a certain and binding way of making it certain. The only possible ground upon which the judgment of the court below can be sustained is that there is no time fixed as a term for the second lease. But it does provide that it shall be leased "for such a period as may then be agreed upon at a yearly rental then to be agreed upon between the contracting parties." It provides the manner in which the rental value shall be determined. A contract of this character will not be defeated because the term is not expressed in certain words, for the execution of the contract and its part performance furnishes a consideration for the promise to lease for a future term. In its essence, the contract, in so far as it is vital to the interest of the parties at the present time, is no more nor less than a contract for a renewal of lease with certain options theretofore agreed upon by the parties. The proviso to paragraph five of the contract makes it certain that there was a mutual consideration and benefit in the minds of the parties. The testimony shows that respondent had adjoining lands. Respondent bound the company to continue to use certain premises or other contiguous land for factory purposes. The benefit sought by the appellant was to acquire land adjoining its present holdings and factory site. The benefit reserved by the respondent is evident. It was to compel a use of the land for factory purposes which would in all

probability enhance the value of his remaining acreage. Moreover, the use of the words that the company should only have a right to lease the land "if it shall then continue to use said premises or other contiguous land for factory purposes," plainly indicates an understanding on the part of the respondent that appellant might build upon the land or otherwise adapt it to its purposes and the necessities of its business. This assumption is further sustained by reference to paragraph seven of the contract, wherein it is provided that if the company "shall desire to abandon the above described premises without purchasing the same, it shall remove therefrom all improvements thereon forthwith, and shall, at its own expense restore said land to a good and satisfactory cultivable condition and shall thereupon surrender peaceable possession."

Coming then to the question of uncertainty as to the terms of the extended lease, paragraph five, upon which the case must turn, is not an agreement for an agreement, but is a contract that the appellant shall have the right to demand a lease at a yearly rental to be agreed upon in the event that respondent declines at that time to sell the land. The contract then being entered into and partly performed, and there being an agreement to lease at a yearly rental, we think it is fundamental that the lease and attornment for a certain term will sustain the right to a continued term, and that a court of equity might, in the absence of all agreement, fix such time as would be reasonable, considering the relative situation and legal rights of the parties. But in the case at bar, we think there is a certainty of which the trial judge failed to take notice. It is the province of courts to construe contracts, not to make them, and if, by any reasonable interpretation, a contract as written can be sustained, it will not be avoided upon the ground of uncertainty, if that which is uncertain can be made certain without doing violence to the general intent and spirit and purpose of the contract when considered as an entire thing. Accordingly it

is held that a lease of doubtful duration is construed most favorably to the tenant. 18 Am. & Eng. Ency. Law (2d ed.), 617; Gear, Landlord & Tenant, § 25. The rule is:

"Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and certain end. But *id certum est, quod certum reddi potest:* therefore if a man make a lease to another for so many years as J. S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty." 2 Blackstone, Commentaries, p. 143.

Consequently when the parties agreed that a lease should be executed and that a time should be agreed upon, they have themselves provided for a method of reducing the term to a certainty, and if either party to the contract captiously or without reason refuses to agree, then will a court of equity fix the term. Where rent is reserved for "a year" or is payable "yearly," or payable "every year," or like terms are used with reference to rent, it is universally held, so far as we are advised, that a tenancy for years is agreed upon and that a tenant is entitled to a lease for at least a term of two years.

"At a yearly rent of £42 payable quarterly" was held to indicate a yearly tenancy. *Doe d. King v. Grafton*, 18 Adol. & E. (N. S.) 495. The words "made payable yearly" were held to be equivalent to the words "payable every year." *Doe d. Shrewsbury v. Wilson*, 5 B. & Ald. 363. A promise to pay "yearly portions" was held to be a promise to pay within two years. *M'Queen v. M'Queen*, 9 U. C. Q. B. 536. In the last case it is said:

"By analogy with cases that have arisen upon leases, where the duration of the term has not been precisely defined, we think it clear that payment could not be enforced till two years at least had expired."

In the case of *Richardson v. Langridge*, 4 Taunt. 128, it is said:

"Here you speak, all along, of an indefinite agreement. If there were a general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year."

An agreement for a lease to be granted *in futuro* for a term of twenty-one years at a yearly rent payable quarterly, possession being taken thereunder, was held to create a tenancy from year to year. *Doe d. Bailey v. Foster*, 15 L. J. C. P. 263. See, also, Underhill, Landlord and Tenant, par. 94.

It seems to us that the principle just announced is sustained in *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715, where an agreement for a lease, reciting that it should run one or more years, was charged with the vice of uncertainty, and it was held that, considering the essential elements of a lease, first, that there must be a definite agreement as to extent and bounds of property leased; second, a definite and agreed term; and third, a definite and agreed price of rental and the time and manner of payment, that the words "one or more years," in the absence of a stipulation or any option in the lease, creates a term of two years. The court said:

"It would seem that the term one or more years in the absence of a stipulation of any option in the lessee, constitutes a term of two years."

The law does not require that the term of a lease should be fixed with absolute certainty in the contract. The law requires no more than that it be prescribed with reasonable certainty. 24 Cyc. 902.

"A lease for no definite term, with an annual rent, which may be payable quarterly or monthly, is a lease from year to year." 24 Cyc. 1028.

"If one demises lands for such term as both parties shall please, this is but a lease at will, because the term is altogether uncertain. But if a man leases his land for years, it is a good lease for two years, because it shall be taken good for such a number with which at least the plural number will be satisfied, and that is with two years." *Bishop of Bath's Case*, 6 Coke (K. B.) 34 b.

If a term is doubtful or cannot be implied, its duration may be ascertained by a consideration of all the circumstances, or may be defined by extrinsic reference. Underhill, Landlord and Tenant, §§ 93, 94; *Horner v. Leeds*, 25 N. J. L. 106. A promise to make a lease at a "yearly rental" at a term to be agreed upon, is as definite and as sufficient to bring it within the rule *id certum est quod certum reddi potest* as an agreement for a lease for "one or more years." A "yearly rental" means the same thing as "a lease for one or more years."

We have treated the contract as a valid subsisting contract. It seems to be entirely fair on its face. No testimony was taken upon the issue of fraud. The case will be reversed, and remanded with directions to the lower court to compel respondent to enter into a lease for a term of two years from and after the 8th day of March, 1914, or for such longer period as the parties may mutually agree upon, and at a rental to be fixed by agreement or by a board of arbitrators as provided in the contract, unless, upon a rehearing of the case, the court sustains the charge that the contract was induced by fraud and is not binding upon him for that reason. It is so ordered.

MORRIS, C. J., PARKER, HOLCOMB, and MOUNT, JJ., concur.

[No. 12588. Department One. March 12, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Pacific Loan & Investment Company, Limited, et al., Plaintiff*, v. THE SUPERIOR COURT FOR KITTITAS COUNTY, *Respondent.*[1]

PROHIBITION — TO COURTS — WHEN LIES — ADEQUACY OF APPEAL. After sale to the plaintiff, confirmation thereof, and expiration of the year for redemption, prohibition lies to prevent the vacation of a decree of foreclosure, sought on the ground that the decree was void for want of personal service of the summons and complaint; since there is no adequate remedy by appeal, inasmuch as, on a retrial of the foreclosure proceeding, the question of the validity of the order setting aside the decree could not be raised, and there is no appeal from an order vacating a judgment.

PROCESS—SERVICE—SUBSTITUTED SERVICE—"AT HOUSE"—STATUTES. A valid service of a summons and complaint is made upon a wife, in a matter affecting community property, by delivering a copy thereof for her to her husband, upon the community premises, and within thirty feet of the dwelling house, upon being informed by the husband that she was not at home; in view of Rem. & Bal. Code, § 226, authorizing such service by leaving a copy "at the house" of her usual abode, with a person of suitable age and discretion then resident therein.

JUDGMENTS—VACATION—LIMITATIONS. Proceedings to vacate a judgment by motion or by petition, under Rem. & Bal. Code, §§ 303, 464-466, are limited to one year after entry of the judgment, unless the judgment is void on its face for want of jurisdiction.

SAME—VACATION—JURISDICTION—DEFECT IN SERVICE. A judgment is not void on its face, so that it may be attacked at any time, where the alleged defect in service of process does not appear in the record, and a showing outside the record is necessary.

JUDGMENTS—BY DEFAULT—VACATION. A default judgment cannot be vacated on petition, unless facts are alleged constituting a good defense to the action, as required by Rem. & Bal. Code, § 467.

Application filed in the supreme court January 13, 1915, for a writ of prohibition to the superior court for Kittitas county, Kauffman, J., to prevent the signing of an order vacating a judgment. Writ granted.

[1]Reported in 146 Pac. 834.

Bogle, Graves, Merritt & Bogle and *John H. McDaniels*, for petitioners.

Parker & Holden and *Pruyn & Hoeffler*, for respondent.

MOUNT, J.—This is an original application for a writ of prohibition, or in the alternative, for a writ of review.

It appears from the record and briefs on file that on April 20, 1913, the Pacific Loan & Investment Company, Limited, commenced an action in the superior court for Kittitas county to foreclose a mortgage upon certain real estate in that county. Thereafter, on the 29th day of April, 1913, the sheriff made a return of service as follows:

"I, B. H. German, sheriff of Kittitas county, state of Washington, do hereby certify that I have received the annexed summons on the 25th day of April, 1913, and after diligent search and inquiry I am unable to find Hannah Alice Mundy, she being a defendant named therein, at her usual place of abode, in my county; that I served said summons on said defendant on the 29th day of April, 1913, by delivering to and leaving with Charles I. Mundy, the husband of said defendant, at said defendant's residence and usual place of abode, he being a person of suitable age and discretion then resident therein, personally in said Kittitas county, a copy of said summons, and therewith a copy of the complaint in the action named in said summons."

Thereafter, on June 6, 1913, the defendants in the foreclosure suit failing to appear, an order of default was entered against them. This order of default recited that the defendants had been personally served and had failed to appear within the time required by law. Thereafter, on the 12th day of July, 1913, a decree of foreclosure was entered. The decree recited personal service upon the defendants. Thereafter, an execution under the decree was issued, and the mortgaged property was sold to satisfy the mortgage. The property was bid in by the plaintiff in the foreclosure suit. After the expiration of the year for redemption, the sale was confirmed. Subsequently a lease was made by the purchaser

to one W. H. McKee. The defendants refused to vacate the premises and a writ of assistance was issued and the tenant of the purchaser was placed in possession. Thereafter, Hannah Alice Mundy, one of the defendants in the foreclosure action, on the 17th day of November, 1914, filed a motion in that action to vacate the decree and to set aside the sale and all proceedings had under the decree. This motion was based upon the ground that the court had no jurisdiction of Hannah Alice Mundy, by reason of the fact that the summons and complaint were not served upon her personally. This motion was supported by affidavits to the effect that the officer who made the service of the summons and complaint did not serve the defendant Hannah Alice Mundy personally, but left a copy of the summons and complaint with her husband at some distance from the dwelling house where the defendant then was. These affidavits were controverted by the officer who made the service. This officer made an affidavit to the effect that, at the time the service was made, he went to within thirty feet of the door of the dwelling house of the defendants and was there met by the defendant Charles I. Mundy, who is the husband of Hannah Alice Mundy, and Mr. Mundy stated to the officer that Mrs. Mundy was away from the house and that the officer could leave the summons and complaint for her with Mr. Mundy and that he would deliver the copies to his wife. The trial court made the following findings of fact upon this motion:

"That on the 29th day of April, 1913, Howard Garrison, a deputy sheriff of the county of Kittitas, went to the farm or ranch then occupied by the defendants Charles I. Mundy and Hannah Alice Mundy as their home and residence, about five miles west of Ellensburg (being the mortgaged premises described in the complaint, proceedings and judgment in the above entitled principal action, and upon which premises the house of usual abode of said Charles I. Mundy and Hannah Alice Mundy was situate), for the purpose of serving the summons in said action upon the defendant Hannah Alice Mundy.

"That the said deputy sheriff, after entering upon said premises, and while upon said premises, was met by the defendant, Charles I. Mundy, husband of Hannah Alice Mundy, who thereupon informed the said deputy sheriff that the said Hannah Alice Mundy was not at home, and that she was then absent from said premises. The said deputy sheriff thereupon delivered to and left with the said Charles I. Mundy, for the said Hannah Alice Mundy, a copy of said summons, together with a copy of the complaint in said action. That the said Charles I. Mundy was then and there a person of suitable age and discretion then resident in the house of the usual abode of said Hannah Alice Mundy.

"That the statement contained in the affidavit of Charles I. Mundy, to the effect that it was previously or at any time arranged and agreed between the said Charles I. Mundy and the said deputy sheriff, Howard Garrison, that the summons and complaint in said action should not be served upon Hannah Alice Mundy personally, is untrue. On the contrary, the court finds that the said Howard Garrison proceeded at all times in good faith in undertaking to serve said summons upon the said Hannah Alice Mundy, and that his statements of fact, contained in his affidavit herein, are entitled to credit.

"That at the time of the entry of the judgment herein sought to be vacated, the defendants Charles I. Mundy and Hannah Alice Mundy were in the occupancy of said mortgaged premises, and claimed the same as their homestead, and on the 23d day of August, 1913, the said Charles I. Mundy duly executed and filed of record his declaration of homestead, covering said premises, according to the laws of Washington.

"That in the face of the conflicting statements contained in the affidavits that have been filed and presented in support of and against the motion to vacate the judgment and proceedings heretofore entered herein, the court declines to make any finding as to just where, on the said Mundy premises, and in respect to the house of the usual abode of said Hannah Alice Mundy, the said deputy sheriff delivered to and left with the said Charles I. Mundy, the copy of the summons and complaint in said action, for said Hannah Alice Mundy.

"But accepting the statements of the said deputy sheriff Howard Garrison, contained in his affidavits as true, the court concludes as matters of law:

"That the copy of the summons and complaint in the said principal action, by the said deputy sheriff so delivered to and left with the said Charles I. Mundy for the said Hannah Alice Mundy, was not left with the said Charles I. Mundy at the house of the usual abode of the said Hannah Alice Mundy; and that the acts of the said deputy sheriff in that behalf were insufficient to constitute a service of said summons upon said Hannah Alice Mundy.

"That the said motion of the defendant Hannah Alice Mundy should be granted, and the findings of fact, conclusions of law, judgment and decree, heretofore and to wit, dated July 12, 1913, and entered July 14, 1913, and the sale made thereunder, and the order confirming said sale, as against her should be vacated and set aside."

The court thereafter refused to enter a formal order until an application could be made to this court for the writ prayed for herein.

It is argued by the respondent that the writ should not issue in this case because the court is not acting without or in excess of its jurisdiction, and because there is a remedy by appeal. A number of cases from this court are cited to the effect that an extraordinary writ of this kind will not issue in a case where there is a remedy by appeal, notwithstanding the court may be acting in excess of or without jurisdiction. We are satisfied that this is a proper case for the issuance of the writ because there appears to be no adequate remedy by appeal. If the decree in foreclosure is vacated and the subsequent sale is set aside, there appears to be no adequate relief to the relators. It is difficult to see how, upon a retrial of the foreclosure proceedings, the question of the validity of the court's order setting aside the decree could be raised upon appeal from a final judgment which may hereafter be rendered in the case. At any rate, it is apparent from the proceedings which have been already had in the case that appeal will neither be speedy nor adequate.

From the statement of the case above, it will be noticed that more than one year elapsed from the entry of the judgment until the motion to vacate was filed. In the case

of *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724, where a judgment was entered in January, 1894, which recited that the defendants therein were duly served with a copy of the summons and complaint and had failed to appear within the time prescribed by law, and where on the 25th day of February, 1898, or four years after the entry of the judgment, the defendants appeared and moved to vacate the judgment for the reason that there was no proof of the service of process, this court issued a writ prohibiting the trial court from vacating the decree. That case is clearly authority for issuing the writ in this case. In *State ex rel. Twigg v. Superior Court*, 34 Wash. 643, 76 Pac. 282, we denied a writ of prohibition in a case where the trial court threatened to vacate that part of a decree which provided for a deficiency judgment. We denied the writ in that case solely upon the ground that the injured party had a remedy by appeal. This court has held that there is no appeal from an order vacating a judgment. *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78; *State ex rel. Harris v. Superior Court*, 34 Wash. 248, 75 Pac. 809.

The respondent also contends that the lower court has jurisdiction to vacate the decree. The decree is regular upon its face; it recites personal service upon the defendants; the sheriff's return of service upon the defendant, Hanna Alice Mundy, recited that it was made by delivering a copy of the summons and complaint to her husband at her residence and usual place of abode; and that she was absent therefrom. This is personal service under the terms of the statute which provides at Rem. & Bal. Code, § 226 (P. C. 81 § 143-5):

"The summons shall be served by delivering a copy thereof, as follows: . . .

"12. . . . to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Service made in the modes provided in this section shall be taken and held to be personal service."

It is conceded that the debt upon which the foreclosure was based was a community debt and the property mortgaged was community property. It is not claimed by the respondent that the place at which the service was made was not the residence and usual place of abode of the defendants, or that the service was not made upon a person resident therein of suitable age and discretion. No fraud is charged against the plaintiff in foreclosure or the officer making the service. It is only claimed that the service was not made *at the house*. The court in its findings set forth above concludes that the service was not made *at the house*, but finds, in substance, that the service was made within the dooryard, within 30 feet of the door of the house, for the statement of the officer is accepted as true.

The respondent relies principally upon the case of *Kibbe v. Benson*, 17 Wall. 624, where it was held that a service made 125 feet from the dwelling house, and not within any of the adjoining buildings or outhouses, was not a sufficient service. In that case the court said:

"Some latitude was, no doubt, intended to be given by this statute. It is not required that the paper shall be delivered to a person who is in the house at the time of such delivery. It may be delivered to one who is at the dwelling-house merely. This expresses the idea of nearness of place, and is less definite than if it had been said, in the house or on the house. To say that one is at home, may mean that he is in the town or city of his residence, or it may mean that he is upon his grounds or in his house.

"The intended effect of this expression is illustrated by the other portion of the provision, which forbids (by implication) the delivery of the paper to one who is not of the age of ten years or upwards. If delivered to a young child, there would not be that probability of its delivery to the defendant in the suit, which might be expected if it was left with one understanding the necessity of its delivery to the person for whom it was intended. Both the person upon whom, and the place where, service may thus be made, are intended to secure a delivery to the party interested. It is not unreasonable to require that it should be delivered on the steps or on a portico,

or in some out-house adjoining to or immediately connected with the family mansion, where, if dropped or left, it would be likely to reach its destination. A distance of one hundred and twenty-five feet and in the corner of the yard is not a compliance with this requirement."

We are satisfied that if we should adopt the reason for the rule there stated, the service in this case was sufficient. It is shown that Mrs. Mundy was not at home when the officer called to serve the summons and complaint. At any rate the sheriff was informed that she was not at home. He was so informed by her husband, who met the officer within about 30 feet of the door of the house, and was told by her husband to leave the summons and complaint with him for his wife. We are satisfied that this was a sufficient personal service upon the wife. It could not reasonably be claimed that it was the duty of the officer to insist that the husband should go into the house in order that the officer might hand the summons and complaint to him. Or if the husband refused, it was certainly not the duty of the officer to himself go into the house and wait until the husband might come into the house. It was clearly sufficient and reasonable to leave the summons and complaint at that place with the husband, who was a community owner of the real estate against which the foreclosure was being made. The husband was a proper person with whom to leave the complaint and summons as they were left in this case.

It is insisted by the relators that the court is without power to vacate the judgment after the expiration of a year, upon the conceded facts in the case. We think there can be no doubt upon this question. The statute provides, at Rem. & Bal. Code, § 464 (P. C. 81 § 1163), that the superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power to vacate or modify such judgment or order, for mistakes, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order, or for fraud practiced by the suc-

cessful party in obtaining the judgment or order. And § 467 provides that the proceedings to obtain the benefit of the above provisions shall be by petition verified by affidavit setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; and such proceedings must be commenced within one year after the judgment or order was made. This court has many times held that this remedy is exclusive in cases like the one under consideration. In *Keith v. Rose*, 59 Wash. 197, 109 Pac. 810, we said:

"Proceedings to vacate a judgment must be instituted under either section 303 or section 464, Rem. & Bal. Code. Under section 303 as originally enacted (Code of 1881, § 109), the application had to be made within a reasonable time, not exceeding five months after the expiration of the term. Terms of court were abolished by the constitution, and the limit with reference to the term was left out of the amendment of February 26, 1891, Laws of 1891, p. 106 (Rem. & Bal. Code, § 303), but the legislature did not thereby intend that such motions should be entertained at any time after judgment. Section 466, Rem. & Bal. Code, fixes the extreme limit beyond which judgments cannot be vacated on motion at one year, and such has been the limitation uniformly applied by this court. *Greene v. Williams*, 13 Wash. 674, 43 Pac. 938; *Denton v. Merchants' Nat. Bank*, 18 Wash. 387, 51 Pac. 473; *Boston Nat. Bank v. Hammond*, 21 Wash. 158, 57 Pac. 365; *Twigg v. James*, 37 Wash. 434, 79 Pac. 959; *Scott v. Hanford*, 37 Wash. 5, 79 Pac. 481.

"This limitation may not apply to judgments which are void on their face, but it does, in our opinion, fix a limit beyond which a purchaser of property is not bound by judicial proceedings to which he is not a party."

The respondent insists that the motion was filed under the provisions of Rem. & Bal. Code, § 303 (P. C. 81 § 295), referred to in the foregoing quotation. If so, the motion was clearly too late under that section. It was also too late under § 464 (P. C. 81 § 1163). It is true this court has said, in cases where a judgment is void upon its face, that it might be

attacked at any time. But this rule does not apply where a showing outside the record is necessary to render a decree or judgment void.

The respondent relies upon the case of *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446. It was said in that case that:

"It is universally conceded that a judgment void for want of jurisdiction over the person of the defendant may be vacated on motion, irrespective of the lapse of time. 1 Freeman, Judgments, § 98, and cases cited. The mere service on one spouse does not give the court jurisdiction over the community. *Powell v. Nolan*, *supra* [27 Wash. 318, 67 Pac. 712]. The contention of the appellants, that want of jurisdiction must appear from an inspection of the record, and cannot be brought to the attention of the court *dehors* the record, is not sustained by the authorities, and we see no good reasons for so holding, because the motion to set aside a judgment is a direct attack upon the judgment."

This was said in a case where the attack was made within the time allowed. We did not intend in that case to hold that a judgment regular in law or regular upon its face may be attacked at any time. All that was said there was said with reference to that particular case. In the case of *Scott v. Hanford*, 37 Wash. 5, 79 Pac. 481, we said:

"Where it appears on the face of the record that no service has been made on the defendant, and the court must know, from a bare inspection thereof, that the judgment is void for want of jurisdiction over the person of the defendant, it will set aside the judgment, on the motion of the defendant or of any one injuriously affected by it; but, when the judgment is valid on its face, it is not thus subject to attack. To set aside a judgment for matters *de hors* the record, it must be attacked by some one of the statutory methods for the vacation of judgments, and within the time limited by statute, or by a suit setting up some equitable ground for its vacation."

See, also, *Twigg v. James*, 37 Wash. 434, 79 Pac. 959, *Keith v. Rose*, and *State ex rel. Boyle v. Superior Court*, *supra*.

We are satisfied, therefore, that the court had no jurisdiction to entertain the motion, for the reason that the time

had elapsed when the judgment could be attacked. It is not claimed by the respondent that Mrs. Mundy has any defense to the action in foreclosure. It was necessary under the statute that this fact should have been stated before the court would be authorized in any proceeding to set aside the judgment and decree. The statute expressly so provides; and this is the general rule in equity. *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Miedreich v. Lauenstein*, 232 U. S. 236. We are satisfied that the court was acting without jurisdiction and erroneously, and that there is no adequate remedy by appeal. The writ is therefore directed to issue as prayed for.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

CHADWICK, J. (concurring)—If I read this case right, it declares the rule I contended for in my dissenting opinion in the case of *State ex rel. Langley v. Superior Court*, 73 Wash. 110, 131 Pac. 482. I therefore concur.

[No. 12494. Department One. March 13, 1915.]

J. R. CARMAN, *Appellant*, v. NELLIE M. CARMAN *et al.*, *Respondents*.[1]

TRUSTS—EXPRESS TRUSTS—CONTRACT—CONSTRUCTION. An agreement whereby a husband deeded a one-half community interest to his wife in consideration of which she agreed to execute a will to protect the husband "for one-half interest in all real estate . . . or money she may die possessed of," does not charge the land with an express trust; but leaves her free to dispose of it in any manner, and only affects property of which she may be possessed at the time of her death.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 4, 1914, dismissing an action to set aside deeds, tried to the court. Affirmed.

Curtis J. Beedle, for appellant.

Vanderveer & Cummings, for respondents.

[1]Reported in 146 Pac. 833.

MOUNT, J.—This action was brought by the plaintiff to set aside certain deeds made by him to the defendant Nellie M. Carman, upon the alleged ground that the property described in these deeds was conveyed to her in trust, and that she had violated the trust by conveying the property to the defendant Lorena Grace Carman. Upon issues joined, the case was tried to the court without a jury. After hearing all the evidence, the court concluded that "the plaintiff had no interest either legal or equitable in the property," and therefore dismissed the action. The plaintiff has appealed.

The facts, in substance, are as follows: For many years prior to the year 1913, the plaintiff and the defendant Nellie M. Carman were husband and wife. The defendant Lorena Grace Carman is their daughter. During coverture the appellant and his wife acquired the real estate in question. All of the property involved is real estate. When the property was acquired, it was placed in the name of the defendant Nellie M. Carman, and she maintained the property, paying the taxes, etc. In fact, Mrs. Carman during her married life has borne the greater burden of supporting the family.

In March, 1911, Mrs. Carman brought an action for divorce against her husband. While that action was pending, the parties thereto agreed upon a settlement and dismissal of the action. On March 29 of that year, the plaintiff, by quitclaim deed, transferred all of his interest in the property to Mrs. Carman in consideration of the dismissal of the divorce action. At the same time and as a part of that transaction, Mrs. Carman executed a will which, after the formal parts, recited in paragraph three as follows:

"I give, bequeath and devise all the rest, residue and remainder whatsoever of my estate, money and property, of every name and nature whatsoever, real, personal and mixed, of which I shall die seized, possessed, or in any manner whatsoever interested in or entitled, to my husband, Jason R. Carman, and my daughter Lorena Grace Carman, to be divided equally between them, share and share alike."

Thereafter the divorce action was dismissed and the appellant and his wife proceeded to live together. Soon after the 29th day of March, the appellant and his wife, while they were living together as husband and wife, signed the following agreement:

"Seattle, Washington, Mar. 29, 1911.

"This agreement, entered into this day, by and between Nellie M. Carman, the first party, and J. R. Carman, the second party, witnesseth, that whereas, the second party has this day conveyed by quitclaim deed to the first party, the undivided community interest in all the real estate we now own; and said second party agrees at all times to be truthful. In consideration of which the first party has this day executed a will to protect the second party for one-half interest in all real estate, mortgages, securities, or money she may die possessed of, as to the terms of said will, and that she will never alter said will, or execute another, without the knowledge and consent of the second party. It is further agreed that neither party to this agreement will ever again, by word or act, refer to the past in any manner reflecting upon the character of the other. It is further agreed that neither will accept any favors or attentions from the opposite sex, without the knowledge or consent of the other. The first party further agrees to never impart to L. G. Carman, our daughter, anything that would tend to reflect upon the character of her father, and destroy the respect a child should have for a parent.

"The transfer of the property and the execution of the will has been done for the express purpose of conserving the property interest and to promote the love, confidence and happiness which should exist between husband and wife after twenty-five years of married life.

"In witness whereof we hereunto subscribe our names.

"Nellie M. Carman.
"J. R. Carman."

Mrs. Carman, upon the trial, testified that this instrument was presented to her by her husband several days after the settlement above mentioned, and that she was requested to sign it; that she did not read the instrument, but that Mr. Carman read parts of it to her, and requested her to sign it;

that she did so without knowing its purport, in so far as it affected her will which she had already made. Mr. Carman, on the other hand, testified that she signed the instrument at the time of the settlement and in consideration for the settlement.

The attorney who prepared the will and was counsel for Mrs. Carman in the divorce case denied that it was signed at the time, or that he knew anything about the agreement. He also testified that, while the settlement was fully discussed in his presence, that no reference was made to this agreement; and that it was agreed at that time that Mrs. Carman should become the absolute owner of the land in question in consideration of the dismissal of the divorce case.

The appellant and his wife lived together thereafter for some little time as husband and wife, when she concluded that he had broken his promise to be faithful to her, and brought another action for a divorce, and a decree of divorce was granted on the 5th day of June, 1913. Thereafter, in July, 1913, fearing that Mr. Carman, so she testifies, might do her bodily harm in order to obtain the property, Mrs. Carman transferred the whole thereof to her daughter and took back from her daughter a declaration of trust. Thereafter this action was brought for the purpose and with the result hereinbefore stated.

It is argued by the appellant that the contract hereinbefore set out creates a trust in specific property, and that because the defendant Nellie M. Carman has transferred all of the property to her daughter, that she has therefore violated the trust, and the court should have decreed a half interest in the property to the appellant.

We think there is sufficient evidence in the record to show that this agreement was not a part of the original agreement wherein the property was transferred by the appellant to his then wife; and we are satisfied that the court so believed, because the decree recites that the "plaintiff has no interest legal or equitable in said property." But whatever may be

the fact in this respect, we are satisfied that, even if this agreement was a part of the original contract at the time the will and deeds were made, it does not create a specific trust in this property. This agreement recites that the appellant has conveyed an undivided community interest in all of the real estate to his wife, "in consideration of which the first party has this day executed a will to protect the second party for one-half interest in all real estate, mortgages, securities, or money *she may die possessed of*." No mortgages, securities, nor money, so far as this record shows, were owned at that time by the parties. The effect of this agreement clearly is, conceding it to be a valid agreement that, upon the death of Mrs. Carman, the property then owned by her is to be divided share and share alike between Mr. Carman and his daughter. It is manifest from the contract itself that Mrs. Carman was authorized to deal with the property thereafter as her separate and individual property; that she might sell it, exchange it, or dispose of any part of it as she saw fit during her lifetime, and that at her death, whatever property may be left or owned by her at that time in real estate, mortgages, securities, or moneys, is to be divided between Mr. Carman and Miss Carman, share and share alike. No other construction can reasonably be placed upon the contract. It therefore creates no express trust in specific property, but is simply a declaration to the effect that Mrs. Carman will give to Mr. Carman at her death one-half of the property of which she may die possessed. When she disposed of the property to her daughter in trust, she did not violate any of the terms of the contract. The appellant, therefore, is not entitled to have the deeds set aside, nor to an undivided interest in the property.

The judgment of the trial court must therefore be affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12426. Department One. March 13, 1915.]

THE TOWN OF REDMOND, *Respondent*, v. W. P. PERRIGO *et al.*, *Appellants*, HOLLAND-NORTH AMERICAN MORTGAGE COMPANY, *Defendant*.[1]

EMINENT DOMAIN—BY CITIES—POWER—STATUTES—REPEAL. Cities and towns of any class are expressly authorized to condemn lands for the purpose of supplying a water system, by 3 Rem. & Bal. Code, § 8005, which supersedes Rem. & Bal. Code, § 7768, limiting such power to cities and towns having over 1,500 inhabitants.

SAME—BY CITIES—PROCEDURE—FAILURE TO PROVIDE. In the absence of a law specifying the procedure, a town of less than 1,500 inhabitants, granted the right of eminent domain, may follow the procedure provided in the general condemnation act, Rem. & Bal. Code, §§ 921, 936, other cities and towns having been authorized to use such procedure.

SAME—PROCEEDINGS—INSTRUCTIONS—MEASURE OF DAMAGES. In a condemnation case, an instruction that the jury may take into consideration the market value of the land together with the amount of depreciation, if any, of the land not taken, and may consider and determine the depreciation by reason of the taking of water rights, and the value of the water rights taken, is correct and not open to the objection that it fails to state that the measure of damages is the difference between the value before and after the taking.

SAME—APPEAL—COSTS. A landowner, unsuccessfully appealing from an award in condemnation, is chargeable with the costs of the appeal.

Appeal from a judgment of the superior court for King county, Smith, J., entered June 16, 1914, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

Solon T. Williams, for appellants.

Weter & Roberts, for respondent.

HOLCOMB, J.—Respondent Redmond is a town of the fourth class, containing less than 1,500 inhabitants. It instituted this action in the court below, by a petition and no-

[1]Reported in 146 Pac. 838.

tice, for the purpose of condemning certain real estate and water rights belonging to appellants outside of the corporate limits of said town, for the purpose of supplying a water system to said town. The appellants interposed a demurrer to the petition, upon the ground that plaintiff had no legal capacity to sue, and also that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the court took testimony and decided the use to be a public use, and empaneled a jury to determine the damages. Upon being tried to a jury, it returned a verdict for $3,000. Upon this verdict the court entered judgment of condemnation, and the award of damages and costs having been paid into court, its decree of appropriation was entered. From the final judgment, defendants appealed.

(1) Appellants contend that the only authority which plaintiff had to condemn and appropriate the land and water desired was under Rem. & Bal. Code, § 7768 (P. C. 171 § 81), and its amendments. That section is as follows:

"Every city of the first, second and third classes and other cities having a population of over fifteen hundred inhabitants within the state of Washington is hereby authorized and empowered to condemn land . . . either within or without the limits of such city for . . . conveying into and through such city a supply of fresh water," etc.

The town of Redmond has a population of something more than 300 inhabitants. The legislature, however, in 1909, passed an act, called the public utilities act, which was slightly modified in 1913, a part of which is as follows:

"Any incorporated city or town within the state be, and is hereby authorized to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate waterworks, within or without its limits, for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons, with an ample supply of water for all uses and purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution and price thereof; . . . It shall

be lawful for any city or town in this state to take, condemn and purchase, purchase, acquire and retain water from any public or navigable lake or watercourse, percolating or subterranean, or any underflowing water within the state, and, by means of aqueducts or pipe-lines, to conduct the same to said city or town; . . . any such city or town shall have the right to acquire by purchase, or by condemnation and purchase any lands, properties or privileges necessary to be had to protect the water supply of such city or town from pollution." 3 Rem. & Bal. Code, § 8005.

The above statute undoubtedly confers upon cities and towns of the first, second, third and fourth classes, and regardless of whether they are of more or less than 1,500 inhabitants, the power to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate water works within or without its limits. It is a later grant of power to cities and towns, and supersedes the former law restricting the power to certain cities and towns. But the appellants contend that, while § 8005 gave the right of condemnation to such towns of the fourth class under 1,500 inhabitants, it did not give a method of condemnation, and that the old law, § 7768, is the only law that provides the method of condemnation. In other words, that while the respondent has the power to condemn, it must go empty-handed away because there is no method provided; that the only method provided for it is to condemn within its own limits. That certainly is not the law. Where the power is given, a method will be accorded. The respondent proceeded under the procedure for the condemnation of land provided in the general condemnation act, Rem. & Bal. Code, §§ 921, 936 (P. C. 171 §§ 173, 281). Section 7767, Rem. & Bal. Code, provides that such towns may use said procedure. The method pursued was the proper procedure for the respondent. *State ex rel. Jones v. Superior Court*, 44 Wash. 476, 87 Pac. 521.

(2) Appellants contend that the proper measure of damages in the case is the difference between the value of the prop-

erty immediately before and immediately after the taking of the condemned portion, and that the court erred in giving and refusing instructions. The court instructed as follows:

"Now, the compensation or measure of damages for you to find is the fair market value of the water right and the land taken, together with the amount of depreciation, if any, to the value of the land not taken, without regard to the proposed construction of water works by the petitioner. In other words, the land has a certain value as it stands today; when the springs are taken away, and the water taken away the land is depreciated, presumably, and we will ask you to determine the depreciation with the water taken away, if any. In other words, what is the value to the premises of the water rights? So that the compensation to be paid Perrigo is the fair market value of the water right and the land taken, together with the amount of depreciation, if any, to the balance of his land by reason of this taking and that is without regard to benefits, if there are any, by reason of the proposed construction of the water works by the petitioner."

How counsel can contend that this instruction does not require the jury to measure the damages by determining the difference between the value of the property immediately before and immediately after the taking away of the condemned portion, we are unable to see. It certainly did not prejudice, but rather benefited, appellants that the court in the instruction given took pains to point out the water right particularly in considering the value of the land before and after the taking. The instruction follows the rule laid down in *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, 33 Pac. 966. We perceive no error in the record. The respondent is entitled to costs of appeal. *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150.

The judgment is affirmed.

MORRIS, C. J., PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 12150. Department Two. March 13, 1915.]

S. YAMAMOTO, *Respondent*, v. PUGET SOUND LUMBER COMPANY, *Appellant*.[1]

APPEAL—REVIEW—VERDICT. A verdict on sharply conflicting evidence, upon which it can only be said the jury might well have found the other way, is conclusive on appeal.

NEGLIGENCE—FIRES—EVIDENCE—SUFFICIENCY. Liability for a fire is sustained, where there was direct evidence tracing the fire from the open burner of a mill, maintained by the defendant, to the buildings of the plaintiff.

TRIAL—GENERAL VERDICT—SEVERAL CAUSES OF ACTION. In an action upon several assigned causes of action, a general verdict in a lump sum may be returned, under Rem. & Bal. Code, §§ 362, 364, where all the causes are submitted to the jury.

ASSIGNMENTS — CONSIDERATION — ACTION BY ASSIGNEE. Proof of consideration for an express assignment in writing is not necessary, and the assignee being vested with legal title, may sue in his own name, although the assignors retained an interest, under Rem. & Bal. Code, § 191.

ASSIGNMENTS — EXECUTION — EVIDENCE — SUFFICIENCY. There is sufficient evidence of proofs of the assignment of losses of several assignors, where the names of the assignors appear on the written assignment introduced in evidence, and they testified that they made such assignment; or where one assignor was allowed to testify, without objection, to the goods lost by him, included in the list, and no objection was made to the assignment for want of authentication.

PLEADINGS—AMENDMENTS—FAILURE TO OBJECT TO EVIDENCE. Where a mistake was made in the name of an assignor given as T. Tamari, and A. Tamari testified without objection that he was the person intended and who sustained the loss, the pleading will be deemed amended.

NEGLIGENCE — FIRES — EVIDENCE OF OTHER FIRES—ADMISSIBILITY. In an action for loss by fire originating from an open burner of a mill, evidence that other similar fires were set out in the vicinity by the burner is admissible, and such evidence is sufficiently definite if a witness testifies that he saw such fires originate from sparks from the burner.

SAME—FIRES—KNOWLEDGE OF OWNER. In an action for loss by fire, set out by an open burner of a mill, evidence tending to show

[1]Reported in 146 Pac. 861.

knowledge by the owner of the mill that the burner was setting out fires is admissible, even if remote, its weight being for the jury.

APPEAL—REVIEW—HARMLESS ERROR. Evidence having no bearing on the issues of the case is harmless.

TRIAL — INSTRUCTIONS — "PREPONDERANCE" OF EVIDENCE. An instruction that by the preponderance of the evidence is not meant the greater number of witnesses, but that evidence which, impartially considered, produces the strongest impression and has the greatest weight and is more convincing as to its truth than the testimony opposed to it, is proper.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence will not be granted where it was only cumulative, and due diligence was not made to produce it at the trial.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 29, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

F. D. Oakley, for appellant.

Hudson, Holt & Harmon, for respondent.

FULLERTON, J.—On March 19, 1913, fire destroyed a Japanese lodging house, situated in the city of Tacoma, and with it certain personal property of the Japanese tenants and their several lodgers. The individuals suffering the losses assigned their claims for damages to S. Yamamoto, who brought the present action against the Puget Sound Lumber Company to recover the value of the property destroyed. In his complaint the plaintiff alleged that the fire which destroyed the property escaped from an open burner which the lumber company carelessly and negligently maintained at its sawmill. The amount of the demand in the complaint was $6,918.48. The jury returned a general verdict in favor of the assignee for $2,350. From a judgment entered on the verdict, the lumber company appeals.

The appellant first assigns that the court erred in refusing to grant its motion for nonsuit, made at the conclusion of the

plaintiff's evidence in chief, and later, in refusing to sustain its motion for judgment notwithstanding the verdict; the chief contention being that the evidence was insufficient to justify the conclusion that the fire originated from the open burner. But without specially reviewing the record, we think the most that can be said is, there was a sharp conflict in the evidence on the question, and that the jury could well have found for the other side. Under these circumstances, the verdict is conclusive on us here. It is the peculiar province of the jury to judge of the weight and sufficiency of the evidence, and their findings on conflicting evidence are conclusive on the appellate court, even though that court may be convinced that the evidence preponderates the other way.

The case before us differs from the case of *Imeson v. Tacoma R. & P. Co.*, 42 Wash. 74, 84 Pac. 624, cited and relied upon by the appellant. In the first place, the case cited, having been tried by the court below sitting without a jury, was reviewable in this court on its facts; and in the second place, there was no direct evidence that the fire concerning the losses for which recovery was sought originated from a cause for which the defendant would have been liable; in fact the court construed the evidence as pointing rather to the contrary conclusion. Here there was direct evidence tracing the fire from the open burner maintained by the defendant to the burned building which contained the articles of personal property destroyed in its burning.

The appellant's next contention is that the verdict is void because of its generality; that there should have been a separate verdict upon each cause of action. But the rule is not so broad as the objection indicates. Under our practice, a general verdict in a lump sum may be properly returned on a complaint containing several causes of action, all of which are submitted for the consideration of the jury. Rem. & Bal. Code, §§ 362, 364 (P. C. 81 §§ 631, 635); *Lebovitz v. Cogswell*, 83 Wash. 174, 145 Pac. 212. It is undoubtedly the rule that a general verdict for one entire sum covering two or

more independent causes of action is properly set aside in whole, if it be found to be erroneous as to one or more of the causes of action, and these are incapable of separation from the general verdict. *Chase v. Knabel*, 46 Wash. 484, 90 Pac. 642, 12 L. R. A. (N. S.) 1155; *Auwarter v. Kroll*, 79 Wash. 179, 140 Pac. 326. But this is the extent of the rule. As we said in *Lebovitz v. Cogswell:*

"It could make no difference to the appellants whether the verdicts were several, or whether there was a joint verdict in favor of the respondents for the aggregate amount of the . . . verdicts."

It is contended, however, that certain of the causes of action were not proven; that there was no proof that the claims of H. Ando, T. Doho, or J. Terao had been assigned to the plaintiff; that the complaint alleged that certain of the property destroyed was the property of T. Tamari, whereas the proofs showed that it was in fact the property of A. Tamari; that on certain of the claims, particularly those of T. Hashimoto and A. Tamari, there were no proofs of value at the time they were destroyed; and that no consideration was shown for any of the assignments.

As to the objection of a want of consideration for the assignments, there was no need of any express consideration. The assignments being in writing, the assignee became vested with the legal title to the claims assigned, and could maintain an action thereon in his own name, notwithstanding each assignor may have retained an interest in his particular claim. Rem. & Bal. Code, § 191 (P. C. 81 § 31); *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788; *Grant v. Walsh*, 36 Wash. 190, 78 Pac. 786.

As to the contention that there were no proofs of the assignments of the claims of H. Ando, T. Doho and J. Terao to the respondent, we find that the names of all of these persons appear on the written assignment introduced in evidence, and that T. Doho and J. Terao severally testified that he had made such an assignment of his claim.

H. Ando, seems not to have so testified, but he was permitted, without objection, to testify to the goods lost by him in the fire and as to their value, and a list of his goods is included in the typewritten list submitted to the jury by stipulation of the counsel as an exhibit to aid their memory when making up their verdict. More than this, the assignment itself was put in evidence without objection on the ground that it had not been properly authenticated. Under these circumstances, the court and jury had a right to assume that the loss of this particular claimant was a subject for consideration, and conceding there was a default in the technical proofs, we think the appellant now estopped to claim an advantage from it. So as to the objection to the mistake in the name of A. Tamari. A. Tamari appeared in person and testified to losses suffered by him, and to the fact that he had assigned his claim for the same to the respondent; and this, in so far as we can discover, without objection on the ground that he was not a person named in the complaint as suffering losses from the fire. His list corresponds with the list alleged to have been lost by T. Tamari. We think it conclusive, therefore, that A. Tamari was the person intended to be named by the designation T. Tamari; and this being so, the defect in the pleading was an amendable defect, and must be treated as amended at this stage of the proceedings. *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780.

With reference to the proofs of value, we think there was evidence on each of the claims that the court permitted to go to the jury sufficient to carry the claim to the jury. True, in some of them the estimates of value were not very definite, being based upon the original cost price and an estimate of the amount of wear, but this is some evidence of value, and that the jury were not seriously misled is evidenced by the very material reductions they made in the witnesses' estimates.

It is claimed that the court erred in permitting testimony to be introduced as to other fires occurring in the vicinity of the lodging house, without proof of the fact that the fires so

occurring originated from the appellant's burner. But we think, in each of the instances pointed out in the record, there was evidence tending to prove the fact thought to be omitted. Take, for example, the following from the evidence of the witness Blomquist, who testified to other fires in the vicinity which are thought not traceable to the burner:

"Q. Did you ever see the grass and stumps up there on that hill around the Japanese boarding house or in that vicinity set on fire by sparks and cinders from the Puget Sound Lumber Company's plant? A. It happens nearly every summer when it is dry, fire every summer when it is dry around. Before the Japanese house was built, it did not seem to be so much danger, it was not cut out by the bank, there was underbrush and tall trees on the hillside, that made a protection from the burner, drew that from everything, when the protection cut out from the bank the air catch that, any wind, and pull it over and it is more danger than it was. Q. In other words, they cut down the bank that had those trees and things on it, is that what you mean? A. Yes, after the trees and underbrush draws out— Q. Had you observed that burner at night when the wind was from the north, whether there were any sparks and what became of them? A. In still weather when the wind is not blowing, then at night they go up, up, up toward heaven; a little more breeze carry over the roof and everything; a stronger wind they carry them lower and catch stumps and things. Q. Where? A. Right in wherever the cinders struck, according to the direction of the wind. Q. If the wind blows from the south, what happens? A. From the south it will carry the cinders directly northwest or to the sea. . . . Q. Have you noticed the grass up there around that house and around in that vicinity take fire when the cinders were there where you could see them? Mr. Oakley: We object to that as incompetent, irrelevant and immaterial. The Court: The objection will be overruled. Exception allowed defendant. A. Yes, sir. Q. Did you ever put out any of these fires or see any others do it? A. Yes, sir. Q. Do you know where the wind was coming from —in what direction the wind was blowing at that time? A. It was blowing in the direction from over the burner. Q. It was blowing in the direction from over the burner? A. Yes,

from the burner, northwest and south; I couldn't say, since I don't have the compass exactly. Q. Is there anything else around there that throws cinders and fire up on that hill except the burner of the Puget Sound Lumber Company? A. No, sir."

Clearly there was here evidence that the other fires concerning which the witness testified were caused by the burner. The evidence of the other witnesses complained of was equally definite, and we think the testimony within the rule. *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 68 Pac. 78; *Noland v. Great Northern R. Co.*, 31 Wash. 430, 71 Pac. 1098; *Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.*, 58 Wash. 332, 108 Pac. 770.

We find nothing inadmissible in the testimony of M. Shimochi or the photographer Lee. The testimony of the first, thought to be objectionable, tended to show knowledge on the part of the appellant that the appellant knew its burners were causing fires on the hill near the vicinity of the burned building. Its tendency in that direction may have been somewhat remote, but it was nevertheless admissible; its weight being for the jury. The testimony of Lee was harmless at best. The fact that he saw a fire burning in a stump in the vicinity of the burned building, when taking photographs of the surroundings of the mill for use in the trial of the present case, may have had no bearing upon any of the issues, but clearly it was harmless.

In its charge to the jury the court gave the following:

"By preponderance of the evidence, the court does not mean the greater number of witnesses on a material point, but rather the weight of the evidence—that evidence which, when fairly, fully and impartially considered by the jury, produces the stronger impression and has the greatest weight with you, and is more convincing as to its truth, when contrasted or weighed against the evidence in opposition thereto."

This instruction was proper. It does not, as the appellant argues, fall within the instruction considered in *Gilmore*

v. Seattle & Renton R. Co., 29 Wash. 150, 69 Pac. 743. In that case it was held that the court invaded the province of the jury by telling them that they should regard one circumstance as more controlling than another, whereas it was within the exclusive province of the jury to say which of the circumstances they would regard as the more controlling. Moreover, it was distinctly stated in the opinion that the court could properly instruct the jury that, in determining the preponderance of the evidence, they need not be controlled by the mere circumstance that a greater number of witnesses had testified upon the one side than upon the other. The instruction here questioned does no more than this.

We find no merit in the exceptions to other instructions given, nor did the court err in refusing to grant a new trial on the ground of newly discovered evidence. The instructions complained of we shall not set forth at length nor further discuss, as we think them a plain statement of the law applicable to the case. The newly discovered evidence was but cumulative of that introduced by the appellant. Furthermore, it was learned by the appellant prior to the trial that the witnesses subsequently discovered were in the vicinity of the lodging house at the time of the fire. It was therefore bound to exercise due diligence in its attempt to procure their presence at the trial, and the required diligence, we think, was not exercised.

The judgment is affirmed.

CROW, MOUNT, MAIN, and ELLIS, JJ., concur.

[No. 12352. Department Two. March 13, 1915.]

A. E. RANSOM, *Appellant*, v. WICKSTROM & COMPANY, *Respondent*.[1]

APPEAL—PRESERVATION OF GROUNDS—CAPACITY TO SUE—WAIVER OF OBJECTION. The objection that a corporation, appearing as an adverse claimant to property levied upon, had not paid its annual license fee, is waived if not raised below by demurrer, answer or reply; and it is not raised by motion for a new trial in the absence of a showing that the objection was advanced at that time.

SALES—CONDITIONAL SALES—AGENCY CONTRACT. A contract providing that the title to an automobile should be vested in an agent for the purpose of facilitating the agent's making repairs and effecting a sale of the car on commission, a joint possession being maintained, is not a conditional sales contract that must be recorded, but merely a contract creating an agency.

PRINCIPAL AND AGENT—DEALINGS BETWEEN—CONTRACTS—TITLE OF PRINCIPAL—RIGHTS OF THIRD PERSON. A contract providing that the title to an automobile should be vested in an agent for the purpose of facilitating the agent's making repairs and effecting a sale of the car on commission, and the bill of sale pursuant thereto, does not divest the owner of his interest, or make the car subject to execution for the debts of the agent; nor does the subsequent bill of sale merge the original contract.

EXECUTION—INTERESTS AFFECTED. An execution runs only against the real and not the apparent interest of the judgment debtor.

SAME—SALE—BONA FIDE PURCHASER. An execution creditor purchasing at his own sale is not a *bona fide* purchaser, within the recording acts.

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—ESTOPPEL—MUTUALITY. Estoppels to vary a written instrument by parol evidence must be mutual; and not applying to a third person not a party to the contract, they cannot be asserted by him against such party.

SAME—PAROL EVIDENCE TO VARY WRITING—THIRD PERSONS. Where a principal gave his agent a bill of sale of an automobile for the special purpose of making repairs and effecting a sale on commission, parol evidence is admissible, as against a third person levying on the car as the property of the agent, to show that the bill of sale was given pursuant to the agency contract, and did not divest the principal of his ownership.

[1]Reported in 146 Pac. 1041.

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 17, 1914, upon findings in favor of the defendant, in an action to determine the title to property held under levy of execution, tried to the court. Affirmed.

Howard O. Durk, for appellant.

ELLIS, J.—This case presents a contest for possession of an automobile, between an execution creditor, through the sheriff of King county holding under the levy of an execution, and a third party claiming title as against the execution debtor.

The facts are these: On March 20, 1914, the claimant, Joseph E. Wickstrom & Company, a corporation, entered into a contract with J. E. Wickstrom, its secretary and manager, which, omitting formal parts and signatures, reads as follows:

"Whereas party of the first part, desires to sell a forty horse power Chalmers Roadster at a profit to itself to provide capital for expansion, and whereas second party has offered to remodel, repair and sell said motor car for a commission of five per cent upon the actual costs of said remodeling and repairs, it is hereby agreed that second party, as agent for first party, be and he is hereby given full power and authority to remodel and repair said motor car No. J 2638, provided the total expense thereof be limited to the sum of $200, and to sell said motor car thereafter for any sum not less than $1,000 in amount and to deduct the said expenses and commission from the selling price and to retain the same for his own.

"It is especially agreed that a bill of sale for said motor car shall be executed by said first party to the said second party as agent in order that any satisfactory deal stipulated may be closed by said agent. Second party may draw and first party pay total amount of expenses incurred prior to the sale of the car and the first party agrees to pay same.

"In the event of funds not being on hand with the first party to pay said expenses, it is hereby specifically agreed that second party may borrow said amount from a third

party or parties at thirty days and may pledge said motor car as security for said loan, the first party hereby specifically assuming the payment of such obligation if incurred by said agent.

"Said second party may have the use of the said car at any time when it is not required for company purposes, but second party shall be responsible to the first party for any damages resulting to the car from such use."

This instrument was neither acknowledged nor recorded. Thereafter a joint possession seems to have been maintained, Wickstrom using the car for his own purposes when it was not in use for the purposes of the corporation. It does not appear that the execution creditor ever had any notice of this contract.

On April 20, 1914, the corporation claimant executed to the execution debtor, Wickstrom, a bill of sale of the car absolute on its face, reciting a consideration of $1,250 cash, in hand paid. This was recorded on April 21, 1914. On April 24, 1914, the execution debtor gave to one James a chattel mortgage upon the automobile to secure the sum of $200. On April 24, 1914, the plaintiff, Ransom, secured a personal judgment against the defendants J. E. Wickstrom and wife for $267.67 and costs, and on April 25, 1914, caused an execution to be issued thereon and levied by the sheriff upon the car here in question as their property. The corporation thereupon filed in the original action an affidavit claiming ownership of the car, and gave a delivery bond in accordance with the provisions of Rem. & Bal. Code, § 573 (P. C. 81 § 891).

A hearing was had upon the issue of ownership presented by the affidavit. The foregoing facts were developed, and in addition thereto, J. E. Wickstrom testified, without objection, that the bill of sale was given pursuant to the original agreement of March 20, and to enable him to carry out that agreement. One witness testified that, when the levy was made, Wickstrom claimed to own the car, but Wickstrom denied any memory of such a statement, though he admitted

that he may at some time have referred to it as his car. The court held that the corporation had established its claim of ownership. The plaintiff's motions for judgment and in the alternative for a new trial were overruled. Judgment was entered adjudging the automobile the property of the corporation claimant, with the right to the immediate possession. The plaintiff appealed.

(1) The appellant first contends that this proceeding should have been dismissed for lack of either allegation or proof that the corporation claimant had paid its annual license fee last due, as required by Rem. & Bal. Code, § 3715 (P. C. 405 § 349). In this connection, reliance is placed upon the first decision in the case of *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 63 Wash. 376, 115 Pac. 855, which held, in effect, that this question might be effectually raised for the first time on appeal. That decision was overruled on a rehearing by the court *En Banc*, the decision being reported in 68 Wash. 457, 123 Pac. 605. We there held that an objection because of the failure to allege payment of the license fee, if not raised in the trial court by demurrer, answer or reply, would be considered waived. See, also, *Rothchild Brothers v. Mahoney*, 51 Wash. 633, 99 Pac. 1031; *Eastman & Co. v. Watson*, 72 Wash. 522, 130 Pac. 1144. In the last case we said:

"If the action is brought when the fee is in default, the action may be abated, upon proper showing, until the fee is paid. If no showing is made, the defendant waives the question."

The appellant urges that this was a statutory proceeding by affidavit to which no answer was required. The sufficiency of the affidavit was, however, in issue from the start. The appellant could and should have raised the question by a demurrer, either written or oral. It is also urged that the motion for a new trial was broad enough to include this objection. It is not pretended, however, that the objection now urged was ever advanced in the trial court even in argument.

In the absence of such a showing, on the authority of the foregoing decisions, we must treat the objection as waived.

(2) It is next urged that the competent evidence was insufficient to establish the claimant's ownership of the automobile. It is argued that the original contract of March 20, 1914, was a contract of conditional sale to the execution debtor; that since it was never recorded, the reservation of title in the corporation was ineffectual as against the execution creditor who, it is claimed, was an incumbrancer in good faith; and that, in any event, that contract was merged in and extinguished by the bill of sale of April 20, 1914. These claims are not tenable. The original contract was not a conditional sale nor a sale of any kind. It was a mere contract creating an agency, for the specific purpose of repairing and selling the car for given commission. That contract provided that the title of the car should be vested in the agent by a bill of sale, to facilitate his disposition of the car in execution of the purpose of the agency. The uncontradicted evidence shows that the bill of sale was made pursuant to this contract and to carry out the original purpose.

It is the settled law in this state that a judgment is a lien on the real and not the apparent interest of the judgment debtor. An execution creditor purchasing under his own levy and sale is not a *bona fide* purchaser within the meaning of the recording acts. He takes no greater rights than the execution debtor had. In this respect there is no distinction between executions upon personal and real property. *Hacker v. White*, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. 945; *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260; *American Sav. Bank & Trust Co. v. Helgesen*, 67 Wash. 572, 122 Pac. 26, Ann. Cas. 1913 A. 390; *Elwood v. Stewart*, 5 Wash. 736, 32 Pac. 735, 1000; *Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489; *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501; *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748; *Bloomingdale v. Weil*, 29 Wash. 611, 70 Pac. 94; *Dawson*

v. McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. 841. It follows, as a corollary—and this court has so held—that an execution creditor purchasing at his own sale is not a *bona fide* incumbrancer. *Benney v. Clein*, 15 Wash. 581, 46 Pac. 1037. These principles are now too thoroughly established in this state to admit of question. It is clear, therefore, that, if parol testimony was admissible to establish the fact that the bill of sale was given pursuant to the original contract and for the purpose of carrying it out, the judgment must be affirmed.

The fallacy of the claim that parol testimony would be inadmissible in such a case as this, on the ground that it would tend to vary the terms of a written instrument, becomes at once apparent when it is remembered that this contest is not between the parties to that instrument, but between one of them and a stranger thereto.

"Greenleaf thus states the law on the subject: 'The rule under consideration is applied only (in suits) between the parties to the instrument, as they alone are to blame if the writing contains what was not intended or omits that which it should have contained. It cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth through the ignorance, carelessness or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others.'" 3 Jones, Evidence, p. 217, § 449.

Let us suppose that the judgment and execution had been against the present claimant and that Wickstrom had claimed, in opposition to the levy, that the car was his. Unquestionably the execution creditor would have been permitted to show by parol evidence that Wickstrom's real interest was only that of an agent holding the legal title for a specific purpose. The fact that parol testimony tends to curtail rather than enlarge the debtor's apparent interest can make no logical difference in the rule by which the real facts may be evidenced. However conclusive the terms of a

written instrument may be between the parties thereto, they are not so conclusive between either of those parties and a third person in litigation where the terms of the written contract are only collaterally in issue. Browne, Parol Evidence, p. 31, § 28.

It is true that where a third person not a party to a contract bases his claim upon it as one made for his benefit, or seeks to render it effective in his favor as against one of the parties by enforcing a right originating in the relation established by it or founded upon it, the rule against the admission of parol evidence applies. 3 Jones, Evidence, p. 220. But we know of no case where the rule excluding parol evidence has been applied as between the parties to the contract and a third person, excepting where the third person was claiming as a beneficiary under the instrument or seeking to assert rights which originated in, that is to say, were primarily created by, the relation established by the written contract, or were founded directly upon it. In order to be bound by the terms of a written contract, third parties must come within the purview of the relation created by it. None of the following decisions, cited in support of the above text, goes further than we have indicated, save certain dictum in the Missouri decision. *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815; *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245; *Current v. Muir*, 99 Minn. 1, 108 N. W. 870; *Schultz v. Plankinton Bank*, 141 Ill. 116, 30 N. E. 346, 33 Am. St. 290; *Schneider v. Kirkpatrick*, 80 Mo. App. 145; *Selchow v. Stymus*, 26 Hun 145; *Hankinson v. Riker*, 10 Misc. Rep. 185, 30 N. Y. Supp. 1040; *Wodock v. Robinson*, 148 Pa. St. 503, 24 Atl. 73.

The appellant's rights here did not *originate* in the bill of sale, nor are they founded upon it. He does not come within the purview of the relation of voluntary vendor and vendee created by it. His relation arises purely as a matter of law, which creates the lien of an execution and attaches it to the

actual rather than the apparent interest of the judgment debtor, whatever that interest may in reality be and however evidenced. If it were to the appellant's advantage to controvert the bill of sale, it cannot be doubted that he could contest its terms and show the real nature of the transaction by parol evidence. There is no principle of equity which would estop him to do so. The fact that it is not to his interest to do so, cannot change the rule nor alter the nature of his rights thereunder. But it is a general rule that estoppels are mutual. Since the appellant would be permitted, if he so desired, to show by parol the real agreement as against the parties regardless of the written contract, the parties to the contract are not estopped as against the appellant also to show the real agreement by parol. While we have found no decision involving the same facts as those here presented, the following authorities exemplify the principle involved: Browne, Parol Evidence, p. 38, § 28; *Carmack v. Drum*, 32 Wash. 236, 73 Pac. 377, 785; *Eaton v. Alger*, 2 Keyes (N. Y.) 41, 45; *Fuller v. Acker*, 1 Hill (N. Y.) 473; *Furbush v. Goodwin*, 5 Foster (N. H.) 425, 446; *McMaster v. President etc. of Insurance Co. of North America*, 55 N. Y. 222, 234; *Sigafus v. Porter*, 84 Fed. 430, 438; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *British & American Mtg. Co. v. Cody*, 135 Ala. 622, 33 South. 832. See, also, note to *Allen v. Ruland* (79 Conn. 405, 65 Atl. 138, 118 Am. St. 146), 8 Am. & Eng. Ann. Cas. 347.

In *Eaton v. Alger, supra*, C transferred to E a note payable to bearer, drawn by J and indorsed by W. He took E's receipt for it, agreeing "to account for the same on demand." In an action by E against the maker and indorser, the receipt was received to establish the claim that title to the note was not in the plaintiff, and that he held it as bailee. The testimony of both C and E, offered to prove the nature of the contract and the consideration of the transfer, was excluded. On appeal this was held error. The court said:

"The general rule is that estoppels are mutual. Parties to an instrument are mutually precluded from varying it by parol; but the rule does not apply to persons who are neither parties nor privies to the contract, and whose rights are not affected thereby. It cannot be doubted that, if the rights of the defendants were injuriously affected by the receipt, they could contradict it by parol; and, therefore, the parties to the receipt are not estopped as to them, and, in an action with them, may show the real agreement by parol."

We have not had the aid of any brief on behalf of respondent in this cause, but after as thorough an investigation of the authorities as the limited time at our disposal would permit, we are constrained to hold that, inasmuch as this contest arises between a party to the contract and a stranger thereto, parol evidence was admissible on both sides to prove the real character of the transaction whereby the execution debtor became possessed of this car. As we have seen, that evidence was sufficient to establish the fact that the bill of sale, though absolute on its face, was really intended to vest the naked legal title in the execution debtor for the purpose of carrying out the original unrecorded agreement between the parties.

The case of *Eisenberg v. Nichols*, 22 Wash. 70, 60 Pac. 124, 79 Am. St. 917, cited by the appellant, is not applicable. The vendor there sought to assert title, under an unrecorded conditional sale contract, as against a *bona fide* purchaser for value. He was precluded by the direct terms of the statute. Rem. & Bal. Code, § 3670 (P. C. 349 § 35). Under the undisputed evidence here, there was no sale, conditional or otherwise. The statute touching conditional sales has no application.

The case of *Worley v. Metropolitan Motor Car Co.*, 72 Wash. 243, 130 Pac. 107, mainly relied upon by the appellant, is equally inapposite. In that case, also, the vendor relied upon an unrecorded conditional sale contract. He sought to assert title as against a chattel mortgage given

to secure an antecedent debt for money borrowed and used as part payment for the car. This court held that the mortgagee having taken his mortgage without notice, either actual or constructive, of the vendor's reserved title, though for an antecedent consideration, was an incumbrancer in good faith within the meaning of the conditional sale statute. We have never held, however, that an execution creditor for an antecedent debt was an incumbrancer in good faith, but just the contrary, as already noted. The reason for this distinction is not far to seek. In the one case, the lien of the chattel mortgage arises from the right of a debtor to give a preference as between unsecured creditors not affected with notice of any fraud on the debtor's part. In the other case, the lien of the execution arises as a matter of law and affects the real interest of the debtor only. It is subject to all existing equities or interests of other persons.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, MAIN, and CROW, JJ., concur.

[No. 11894. Department Two. March 19, 1915.]

ABERDEEN CONSTRUCTION COMPANY, *Appellant*, v. THE CITY OF ABERDEEN, *Respondent*.[1]

INDEMNITY—IMPLIED CONTRACT—VOLUNTARY PAYMENT. Where a contractor on city work, legally liable to his employee for damages for personal injuries occasioned by putting the employee in an unsafe place to work, paid the damages in a reasonable amount before judgment rendered, the payment was not such a voluntary one as to preclude recovery over against the city, when the latter was primarily liable for the unsafety of the place provided.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS — CONTRACTS—PROTECTION FROM LIABILITY. A stipulation in a contract for public work that the contractor "agrees to save the city free and harmless from any and all loss, damage or liability caused by any neglect or want of care, or any act or omission done or suffered to be done by the said contractor, its agents, servants, employees or subcontractors in the performance of said contract," has reference only to damages occurring from the negligence of the contractor and cannot be held to protect the city from injuries caused by its own negligence or carelessness.

INDEMNITY—IMPLIED CONTRACT—JOINT TORT FEASORS. Where a contractor on city work does the work in accordance with the city's defective plans and specifications, protesting that they were unsafe and on the assurance by the city that they were safe, the contractor is not *in pari delicto* with the city, and may recover from it such damages as he has been compelled to pay an injured employee by reason of the dangerous condition of the place arising from making the improvement in accordance with the plans and specifications.

MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACTS—WARRANTY OF PLANS. Warranty of the plans and specifications under which a contractor does city street grading cannot be imputed to him in the absence of any stipulation in the contract to that effect, and the city alone can be held liable as warranting the sufficiency of the plans and specifications.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 20, 1913, upon sustaining a demurrer to the complaint, dismissing an action for contribution. Reversed.

[1]Reported in 147 Pac. 2.

Ballinger, Battle, Hulbert & Shorts, for appellant.

A. Emerson Cross and *John C. Hogan*, for respondent.

Crow, J.—Action by Aberdeen Construction Company, a corporation, against the city of Aberdeen, for contribution. From an order sustaining a demurrer to the complaint and dismissing the action, the plaintiff has appealed.

The only question presented is whether the complaint states a cause of action. Omitting formal parts, it in substance alleges, that on or about May 31, 1910, appellant entered into a contract with respondent for the improvement of certain streets in the city of Aberdeen, in accordance with plans and specifications prepared by the city, the work to be done under the direction of the city engineer; that a part of the work to be performed—the grading of certain streets—required deep cuts, leaving high, perpendicular banks on either side; that the plans and specifications required appellant to leave such perpendicular banks in making excavations, so that the city would have less excavation for which to pay, and would not be required to condemn adjoining property; that on July 25, 1911, while appellant was engaged in performing this contract and without fault upon its part, but entirely by reason of the carelessness and negligence of respondent's officers who prepared the plans and specifications, which were defective, a large portion of a perpendicular bank, without warning, caved in, gave way, struck the arm of a steam shovel then operated by appellant, and caused the arm to swing around, strike, and seriously injure one Austin F. Brockett, a teamster then in appellant's employ; that the injuries to appellant's employee were caused proximately and primarily by respondent's negligence, in that by the plans and specifications it required high, perpendicular embankments instead of having them sloped in a safe manner; that the bank which caved and fell had been excavated and finished in accordance with the plans and specifications; that the city engi-

neer assured appellant and its employees the bank was safe; that as a matter of fact it was unsafe and dangerous; that appellant and its officers had complained to respondent and its engineer of the danger of excavating streets in the manner required, but that respondent required appellant to proceed according to the plans and specifications, and that the engineer, after inspection, assured appellant and its employees that the bank was safe; that on December 23, 1912, the injured employee, Austin F. Brockett, commenced an action against appellant for damages in the sum of $30,000, alleging that appellant had been negligent in failing to furnish him a reasonably safe place in which to work; that on January 14, 1913, appellant settled the action for $7,309, which sum it then paid in full satisfaction and discharge of the damage sustained; that the sum so paid was reasonable compensation; that on January 23, 1913, appellant filed with respondent a claim for the amount paid to Brockett, but that the claim was rejected by the city council.

Appellant, basing its right to recover on the doctrine announced in *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*, 71 Wash. 359, 128 Pac. 654, and the cases therein cited, contends that the accident and injuries to its employee were caused primarily by the carelessness and negligence of the respondent city, in that it caused defective plans and specifications to be prepared by its engineer; that the work was to be done under the supervision and direction of the engineer; that appellant was required to comply with the specifications and supervision of the engineer; that the defective plans were the primary cause of the accident; that while appellant was required to provide its servant a safe place in which to work, yet as between appellant and the respondent city, appellant was not negligent; that appellant and respondent were not *in pari delicto;* that the plans and specifications were warranted by respondent and not warranted by appellant, and that, as the accident was primarily caused by the defective plans, appellant is entitled to contribution.

Respondent contends that, as no judgment was entered against appellant in favor of its injured employee, the payment of damages made by appellant was voluntary and no recovery can now be had; that appellant is debarred from maintaining this action by reason of the terms of its contract with respondent, which, *inter alia*, provides that "the said contractor further agrees to save the city free and harmless from any and all loss, damage or liability caused by any neglect or want of care, or any act or omission done or suffered to be done by the said contractor, its agents, servants, employees or subcontractors in the performance of said contract;" that conceding respondent was negligent, it and appellant being joint tort feasors, appellant had no right to contribution for damages paid; and that, as appellant knew the perpendicular bank was dangerous, it was guilty of such gross negligence in permitting its employees to work within the zone of danger that it cannot now recover from respondent.

The allegations of the complaint being admitted for the purposes of the demurrer, it is conceded that the employee was injured in the manner alleged; that as between him and appellant the latter was liable; that the action was brought and that the damages paid were reasonable in amount. It follows, therefore, that no question as to the amount of damages paid is raised by the demurrer. In *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*, *supra*, the plaintiff paid damages without the entry of any judgment; yet its right to maintain an action for contribution was sustained.

"To entitle one to contribution the payment must be compulsory in the sense that the party paying was under legal obligation to pay, but according to the weight of authority it is not necessary to make the payment involuntary that suit should have been instituted against the person seeking contribution or that a levy should have been made on his goods." 9 Cyc. 798.

Under the facts alleged in the complaint and admitted by the demurrer, it cannot be held that the payment which was

made by the appellant was voluntary or that the appellant is thereby precluded from a recovery in this action. The questions whether the payment was voluntary and whether the amount paid was a reasonable compensation, are issues of fact to be raised by the pleadings and determined upon a trial of the action.

It is manifest that the stipulation in the contract above quoted, upon which the respondent relies, was inserted for the purpose of protecting the respondent from any damage or disability caused by negligent acts of appellant or its employees, and not to protect respondent from injury or damage caused by its own negligence or carelessness. The stipulation of itself is not sufficient to preclude appellant from a recovery on the cause of action pleaded.

The principal question before us is whether appellant and respondent were joint tort feasors, and, if so, whether appellant stands in such a relation to respondent with reference to the facts involved as will preclude it from obtaining contribution. The doctrine announced in *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*, *supra*, upon which appellant relies, is sufficient to sustain its contention. Conceding that appellant and respondent are joint tort feasors, it is a well-recognized principle of law that, to preclude appellant from recovering, it and respondent must stand *in pari delicto*. In *Lowell v. Boston & L. R. Corporation*, 23 Pick. 24, 34 Am. Dec. 33, the court said:

"Our law, however, does not in every case disallow an action by one wrong-doer against another, to recover damages incurred in consequence of their joint offence. The rule is *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. In respect to offences, in which is involved any immoral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the

policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers."

The facts pleaded in this case show that the defective plans and specifications were adopted by respondent, and that the appellant contracted to do the work in accordance therewith under the direction and supervision of the city engineer. This contract imposed an obligation to do the work in the manner required. This appellant did. In the absence of any stipulation in the contract that appellant warranted the sufficiency of the plans and specifications, no such warranty can be imputed to it. We in substance so held in *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, 142 Pac. 675. No such warranty by appellant has been called to our attention. It necessarily follows that the sufficiency of the plans and specifications was warranted by the city. To now hold, as a matter of law, that appellant, in performing its contract in accordance with such plans and under the direction of the city engineer, was in equal fault with the respondent or was guilty of negligence as between it and respondent, would be unjust. The only wrong charged against appellant as between it and its employee involved no moral delinquency or turpitude, nor was its offense one that can be considered a *malum prohibitum* or immoral in any respect. It therefore should not be held to be against the policy of the law to inquire into the relative delinquency of appellant and respondent.

Assume that respondent had let the contract to an individual instead of the appellant corporation, and that such individual had been doing the work personally in accordance with the plans and specifications under the direction of the city engineer, and upon his assurance that the banks were free from danger, and assume that the contractor had been injured by the bank falling upon him; it would hardly be contended as a matter of law that he could not recover damages from the city. At most, under such circumstances, the

questions whether he assumed the risk or had been guilty of contributory negligence would be issues of fact which should be submitted to the jury. While it must be conceded that, as between it and its employee, appellant was guilty of negligence in failing to furnish the employee a safe place in which to work, it would seem that, as between it and the respondent municipality, it should not be held guilty of negligence, as a matter of law, in performing the work in exact compliance with the defective plans and specifications and under the supervision of the city engineer. In *Potter v. Spokane*, 63 Wash. 267, 115 Pac. 176, this court held that the city was liable for damages where it appeared that the injury was caused by a defect in the plans and specifications and was not due to defective workmanship. We there said:

"The evidence abundantly showed that the bulging out and collapse of the fill was due to a defect in the plans of the work, and not to defective workmanship. In such a case, the person authorizing the work cannot escape liability for injuries incurred thereby by intrusting the work to an independent contractor. *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6."

In view of our holdings in the above case and in *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*, *supra*, we conclude that the complaint stated a cause of action.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

MORRIS, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 12016. Department Two. March 19, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. M. M. DODD, *Appellant*.[1]

PROSTITUTION—INFORMATION—SUFFICIENCY. Under Rem. & Bal. Code, § 2240, subd. 1, making it a felony to place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution . . . etc., an information charging the accused with placing his wife in charge of another for immoral purposes, to wit, in the charge of S., although following the language of the statute, is insufficient, since the statute is couched in general terms, capable of being applied to a variety of acts, making it necessary to charge the act or acts relied upon falling within the general terms of the statute.

SAME. For the same reason, under Rem. & Bal. Code, § 2240, subd. 5, making it a felony to solicit any person to go to a house of prostitution for any immoral purpose, an information in the language of the statute is insufficient if it fails to charge what particular immoral purpose or purposes the solicitation covered and were relied upon to constitute the offense.

SAME. Under Rem. & Bal. Code, § 2440, subd. 5, making it a felony to solicit any person to have sexual intercourse with a common prostitute, an information charging the accused with soliciting a person to have sexual intercourse with one D. with intent that she should become a common prostitute is insufficient.

INDICTMENT AND INFORMATION—REQUISITES—DIRECTNESS AND CERTAINTY—PROSTITUTION. Under Rem. & Bal. Code, § 2240, subd. 4, making it a felony for the husband to "connive at, consent to, or permit" his wife's being or remaining in any house of prostitution or leading a life of prostitution, an information charging the offense only by inference, in that it merely alleged that he solicited certain persons to go to a house of prostitution, and to have sexual intercourse with her with intent that she should lead a life of prostitution, is insufficient, in view of Id., § 2057, requiring the information to be direct and certain as to the crime charged and the circumstances of the crime when necessary to constitute a complete crime.

INDICTMENT AND INFORMATION — REQUISITES — DUPLICITY. An information is bad for duplicity where it charges the defendant with the three overt acts of (1) placing his wife in the charge of another person for immoral purposes, (2) of soliciting certain individuals to go to a house of prostitution for an immoral purpose, and (3) with

[1]Reported in 147 Pac. 9.

conniving at and consenting to his wife's leading a life of prostitution, without attempting to charge that the three acts were connected in any way, and all of which are specified as different offenses under Rem. & Bal. Code, § 2440, subds. 1, 4 and 5; since Id., § 2059, provides that an information must charge but one crime and in one form only, except where the crime may be committed by the use of different means, in which case the means may be alleged in the alternative.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 24, 1913, upon a trial and conviction of placing a female in a house of prostitution. Reversed.

Alfred M. Craven, for appellant.

George H. Crandell and *D. B. Heil*, for respondent.

FULLERTON, J.—The appellant was convicted and sentenced to a term in the penitentiary, upon an information which, omitting the formal parts, reads as follows:

"Comes now the prosecuting attorney for Spokane county, state of Washington, and charges the defendant, M. M. Dodd, with placing a female in a house of prostitution, soliciting a person to go to a house of prostitution for an immoral purpose, and being the husband conniving at and consenting to his wife leading a life of prostitution.

"That the said defendant, M. M. Dodd, on or about the 5th day of July, 1913, in the county of Spokane, state of Washington, then and there being, did then and there unlawfully, feloniously and wilfully place a female, his wife, Katie Dodd, in the charge of another person for immoral purposes, to wit, in the charge of W. H. Scott; that said defendant on said date solicited one Norman Clyne and one Frank Cape to go to a house of prostitution for an immoral purpose, and to have sexual intercourse with said Katie Dodd, with intent that she, the said Katie Dodd, should become a prostitute and lead a life of prostitution."

When required to plead to the information, the appellant demurred thereto, basing his demurrer on a number of the statutory grounds. The demurrer was overruled and a trial had, which resulted in a verdict against the appellant, find-

ing him "guilty as charged in the information." Based on the finding of the jury, the court adjudged the defendant "guilty of the crime of placing a female in a house of prostitution, soliciting a person to go to a house of prostitution for an immoral purpose, and being the husband, conniving at and consenting to his wife leading a life of prostitution as charged in said information;" following in this respect the designation of the offense sought to be charged as it appears in the information.

The section of the statute on which the information is based is found in the criminal code of 1909 at § 188, Laws 1909, p. 944, and reads as follows:

"Every person who—

"(1) Shall place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution, with intent that she shall live a life of prostitution, or who shall compel any female to reside with him or with any other person for immoral purposes, or for the purposes of prostitution, or shall compel any such female to reside in a house of prostitution or to live a life of prostitution; or

"(2) Shall ask or receive any compensation, gratuity or reward, or promise thereof, for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons not her husband; or

"(3) Shall give, offer, or promise any compensation, gratuity or reward, to procure any female for the purpose of placing her for immoral purposes in any house of prostitution, or elsewhere, against her will; or

"(4) Being the husband of any woman, or the parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, shall connive at, consent to, or permit her being or remaining in any house of prostitution or leading a life of prostitution; or

"(5) Shall live with or accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute;

"Shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more

than two thousand dollars." Rem. & Bal. Code, § 2440 (P. C. 135 § 375).

Comparing the language of the information with the language of this section of the code, it is apparent that the pleader intended to charge the appellant with having violated three separate acts prohibited thereby, contained in as many separate subdivisions. The appellant is charged, under subdivision 1, with having placed a female in the charge of another person for an immoral purpose; under subdivision 5, with having solicited persons to go to a house of prostitution for an immoral purpose; and, under subdivision 4, with being a husband of a woman and conniving and consenting to her leading a life of prostitution. From the judgment entered, it is made clear, also, that the court concluded that the verdict of the jury found the defendant guilty of violating these particular prohibitions of the section cited.

In this court the appellant makes two principal contentions, the first of which is that the information does not state facts sufficient to constitute a crime under any of the three subdivisions mentioned on which it purports to be based; and, second, that, if sufficient facts are alleged, it charges three separate and distinct offenses, and not the commission of one offense by different means, and is thus contrary to § 2059 of Rem. & Bal. Code (P. C. 135 § 1023), which provides that an information must charge but one crime, and in one form only, except where the crime may be committed by the use of different means, in which case the means may be alleged in the alternative.

It has seemed to us that there is merit in these contentions. With regard to the first, it will be observed that the words used in subdivision 1 of the section quoted, to define the crime sought to be charged thereunder, are wide and general in their application, and can be applied to acts wholly dissimilar in their nature. For example, it would be placing a female in the custody and control of another person for an immoral purpose to place her therein for the purpose of hav-

ing her beg on the street for her custodian, or to have her perform acts of theft for his benefit, or to live with him in a state of concubinage, or to practice prostitution with others for his gain. Many other acts falling within the meaning of these words might be enumerated, but these are enough to show that a charge in the general words of the statute does not inform the defendant of the specific offense with which he is accused, or, to use the language of the statute, does not "contain a statement of the acts constituting the offense . . . in such a manner as to enable a person of common understanding to know what was intended." The effect is that the defendant is compelled to wait until the state develops its proofs at the trial before he can know the specific charge against which he was required to defend. This is not enough. The information should state the particular immoral purpose on which the state intends to rely in support of its accusation.

We are aware that it is a general rule that an indictment or information is sufficient if it charges the offense in the language of the statute. But to the rule there are many exceptions. Where the statute itself descends into particulars, and recites the particular acts which constitute the crime, it is sufficient to charge the crime in the language of the statute. But where, as here, the statute is couched in general terms, capable of being applied to a variety of acts, it is not sufficient that the information charge the offense in the general terms, but it must state the act or acts falling within the general terms on which the state intends to rely for conviction.

The second charge in the information, the charge of soliciting, is we think insufficient for the same reason. Since a person may solicit another to go to a house of prostitution for different immoral purposes, the accused has the right to know in advance of the proofs of what particular immoral purpose or purposes the solicitation covered on which the state intends to rely for a conviction. This part of the charge is not aided by the concluding clause of the informa-

tion. It is not alleged that the woman named was an inmate of or at the house of prostitution to which the persons named were solicited to go, nor is it alleged that she was a common prostitute, so as to bring the charge within this particular clause.

The third charge is but a deduction from the other two charges. It will be observed that the information does not use the expressions "connive at," or "consent to," or "permit," in connection with this particular charge, and that the defendant did so "connive at, consent to, or permit her . . . leading a life of prostitution" is inferable only from other expressions used. But under our practice, crimes cannot be charged by inferences. By the code, the information must be direct and certain as to the crime charged, and the particular circumstances of the crime charged when the circumstances are necessary to constitute a complete crime. Rem. & Bal. Code, § 2057 (P. C. 135 § 1019).

We think, also, that the information, conceding it to be sufficient in the particulars discussed, is faulty for the second reason urged by the appellant. It may be that a person could, by a series of connected overt acts, violate the prohibitions of the clauses in question found in subdivisions 1 and 4 of the section quoted in such a manner as to permit the inclusion of the entire acts in one information, but it is difficult to see how any series of acts could be so connected as to make it permissible to include therewith the prohibited matter found in subdivision 5. Seemingly the acts prohibited by this latter subdivision must, under all circumstances, be disconnected with the other prohibited acts. The act of a husband in placing his wife in the custody of another person for an immoral purpose and with the intent that she shall lead a life of prostitution, has no readily perceived connection with the act of soliciting persons to go to a house of prostitution for an immoral purpose, be that immoral purpose what it may. If this be true, to connect them in one information is to make the information bad for duplicity.

But perhaps to inquire what may be done is beside the question before us. Here the pleader sought to charge the appellant with three distinct overt acts without attempting to charge that they were connected in any way. This information is therefore bad for duplicity, whatever might be the holding as to one drawn in the manner indicated.

Our conclusion is that the judgment must be reversed, and the cause remanded with instructions to sustain the demurrer to the information. It is so ordered.

CROW, MOUNT, MAIN, and ELLIS, JJ., concur.

[No. 12056. Department Two. March 19, 1915.]

T. D. McLAUGHLIN, *Respondent*, v. J. H. DOPPS *et al.*, *Appellants*.[1]

BILLS AND NOTES—HOLDER IN DUE COURSE. A negotiable promissory note, indorsed and transferred by the payee to a creditor on an open account and accepted and applied by the creditor on the account as a *pro tanto* payment thereof, without any knowledge on the indorsee's part of any fraud in its inception, and without any showing of facts from which bad faith might be implied, constitutes the indorsee a holder in due course, and entitled to enforce the note against the makers thereof.

TRIAL—PROVINCE OF COURT AND JURY—BILLS AND NOTES—HOLDER IN DUE COURSE. Although the burden of proof is upon the owner of a negotiable instrument, if the title is shown to be defective, to prove that he, or some person under whom he claims, acquired title as a holder in due course, it is not error to withdraw the question from the jury and determine it as a matter of law, when the evidence is so clear and convincing that reasonable minds can draw but one conclusion therefrom.

SALES—FAILURE OF CONSIDERATION—SUFFICIENCY OF EVIDENCE. A failure of consideration for the giving of a promissory note on the sale of a stallion, warranted to get sixty per cent of producing mares with foal with proper care and handling, is not established by evidence showing that only forty-four per cent of the mares served produced foals, when there was no showing as to what proportion of the mares served were producing mares.

[1]Reported in 147 Pac. 6.

Appeal from a judgment of the superior court for Benton county, Kauffman, J., entered November 29, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a promissory note. Affirmed.

M. M. Moulton, for appellants.

Driscoll & Leonard, for respondent.

MAIN, J.—The purpose of this action was to recover on a promissory note. The note was signed by nine individuals and one firm name. Summons was served upon all the makers of the note with the exception of three. Three general defenses were interposed on behalf of all of the defendants who were served with process: First, that the making of the note was induced by false and fraudulent representations; second, that there was a failure, or partial failure, of the consideration; and third, that the plaintiff was not a holder in due course. Three of the defendants who appeared interposed the defense that they had not signed the note. At the conclusion of the evidence, the trial court held that it was clearly shown that the plaintiff was a holder in due course, and directed a verdict, with the exception that there was submitted to the jury the question as to the signatures of the three defendants who were contesting upon this ground. The jury returned a verdict in favor of the plaintiff upon the question of the signatures. Judgment was entered against all of the defendants upon whom summons had been served, with the exception that no judgment was entered against the firm whose name appeared upon the note, but only against the individual member who had signed the firm name. From the judgment entered, five of the defendants have appealed.

The facts are briefly as follows: On April 3, 1906, at Kennewick, Washington, one W. R. Clemans, as agent of the Palo Alto Stock Farm, sold to a voluntary association of men a Percheron stallion named "Irresistible," for the price of $4,000. In payment of the purchase price, four

promissory notes were given for $1,000 each. The first note became due on September 1, 1907. The note which is the foundation of the present action became due on September 1, 1910. On April 5, two days after the execution and delivery of the notes, the Palo Alto Stock Farm gave a warranty as to the horse. This warranty contained the provision that, "if the above named stallion (Irresistible) does not get sixty per cent of the producing mares with foal with proper care and handling, or seventy-five per cent with proper use of the impregnator, we agree to replace him with another stallion of the same breed and price, upon delivery to us of said stallion in as sound and as good condition as he is at present."

This warranty also contained the provision:

"This is the only contract or guarantee given by us and it is not to be changed or varied by any promise or representations of the agent."

In the spring of the year 1907, the president of the voluntary association wrote the Palo Alto Stock Farm that the horse had not produced as many colts as had been expected, and suggested that another horse be substituted in his place before the opening of the season of 1907. In reply to this letter, the Palo Alto Stock Farm, by N. W. Thompson, its manager, wrote and suggested that the horse be kept another season, expressing the belief that he would prove satisfactory upon a further trial; also stating that the Palo Alto Stock Farm at that time did not have on hand as good a horse that could be exchanged. The horse was retained and used during the year 1907, and every season thereafter up to the time of the trial of this action, which was on November 29, 1913.

On January 31, 1908, the note here sued upon, together with two of the other notes, were sold by the Palo Alto Stock Farm to McLaughlin Brothers, whose principal place of business was Columbus, Ohio, but conducted a branch office at St. Paul, Minnesota. The St. Paul office was under the management and control of T. D. McLaughlin, who was not a member of the firm of McLaughlin Brothers, but was a

brother of the members of that firm. McLaughlin Brothers were in the business of importing high grade stallions, and then selling them in carload lots to retailers. The Palo Alto Stock Farm was a retailer and sold horses direct to farmers or associations of farmers. McLaughlin Brothers, through their St. Paul office, had sold horses to the Palo Alto Stock Farm from time to time covering a period of years. They were generally sold upon account and not for cash. McLaughlin Brothers kept an open account with the Palo Alto Stock Farm, and the latter also kept an account of its transactions with McLaughlin Brothers. On January 31, when the notes mentioned were sold to McLaughlin Brothers, the Palo Alto Stock Farm owed that firm practically $12,000. At the time the three Kennewick notes were sold, other notes aggregating $7,000 were transferred, making a payment of $10,000 in all upon the account.

On February 28, 1908, the president of the Kennewick Stock Breeders Association, which was the voluntary association to which the horse had been sold, wrote the Palo Alto Stock Farm that there had come to the knowledge of the members of the association within a few days last past that there had been misrepresentations and fraud in the sale of the horse to them, in that certain members of the association who had signed the note had been, by the agent Clemans, given a special contract intended to relieve them from liability as members of the company; and also that there had been a breach of the warranty as to the stallion Irresistible. The letter concluded with a notification that the contract was rescinded, and that the horse was held subject to the order of the Palo Alto Stock Farm. Notwithstanding this letter, as already stated, the horse was retained and used each succeeding season thereafter by the Kennewick Stock Breeders Association.

The controlling question in this case is whether the plaintiff was, as a matter of law, a holder in due course of the note sued upon. The suit was originally instituted by the Ger-

man-American National Bank. After the suit had been begun, T. D. McLaughlin was substituted as party plaintiff. If McLaughlin Brothers, at the time they purchased the note on January 31, 1908, were holders in due course, T. D. McLaughlin is in the same position. To determine whether McLaughlin Brothers became holders in due course, an examination of the evidence is necessary.

T. D. McLaughlin testified that, at the time of the sale of the note, the Palo Alto Stock Farm was owing McLaughlin Brothers approximately $12,000; that the note was taken as a payment on the account; that at the time of the purchase, he examined a rating of the makers thereof made by a bank at Kennewick; that he had no knowledge of any infirmity in the note; that McLaughlin Brothers, covering a period of years, had sold horses to the Palo Alto Stock Farm, and had generally taken notes in payment of the account; that the notes taken upon this occasion were the only ones that they had ever received from the Palo Alto Stock Farm upon which it was necessary to bring suit in order to collect; that he had no other means of collecting the note other than from the makers thereof.

The books of McLaughlin Brothers and also of the Palo Alto Stock Farm, showing the accounts between the two concerns, were introduced in evidence. McLaughlin Brothers' account shows the purchase of the notes, and that credit was given the Palo Alto Stock Farm therefor. The Palo Alto Stock Farm books show the transfer of the notes to McLaughlin Brothers and the latter firm is charged with the amount thereof upon the account.

N. W. Thompson, manager of the Palo Alto Stock Farm, was not produced as a witness, but it was admitted upon the trial that if he were present he would testify that the notes were transferred to McLaughlin Brothers for value and in good faith.

One C. H. Keller, by deposition, testified that, at the time of the taking of his deposition, to wit, August 19, 1913, he

was residing at Oakland, California, and was an attorney at law; that on January 31, 1908, when the note in question, together with the other two notes, were transferred from the Palo Alto Stock Farm to McLaughlin Brothers, he was the bookkeeper for the latter firm at the St. Paul office; that he had had no connection with the firm of McLaughlin Brothers since July 1, 1912, and had no interest in the outcome of the litigation; that the notes were purchased by McLaughlin Brothers, and taken as payment upon the account; that he made the entry upon the books of McLaughlin Brothers showing the transaction; that at the time of the transfer, he, together with T. D. McLaughlin and Thompson, examined the rating as to the financial standing of the defendants; that, at the time of the transfer of the notes, the Palo Alto Stock Farm owed McLaughlin Brothers approximately $12,000; that at the time the notes were purchased, inquiry was made of Thompson if there were any reasons why the notes would not be paid promptly when due, and were assured by Thompson that the notes were first class paper, and would be promptly paid.

The law applicable to these facts will now be noticed. Under the provisions of the negotiable instruments act, when the title to a negotiable instrument is shown to be defective in the person negotiating it, the burden is upon the owner of the instrument to prove that he, or some person under whom he claims, acquired title as a holder in due course. Rem. & Bal. Code, § 3450 (P. C. 357 § 117); *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884; *Cedar Rapids Nat. Bank v. Myhre Bros.*, 57 Wash. 596, 107 Pac. 518; *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102; *Union Inv. Co. v. Rosenzweig*, 79 Wash. 112, 139 Pac. 874. The burden being on the plaintiff to show that he was a holder in due course, the question may be withdrawn from the jury and determined as a matter of law, when the evidence is clear and convincing and of such a nature that reasonable minds can draw but one conclusion therefrom. *Richmond v. Tacoma*

R. & P. Co., 67 Wash. 444, 122 Pac. 351; *Union Inv. Co. v. Rosenzweig, supra.*

In the case of *Scandinavian-American Bank v. Johnston, supra*, the plaintiff, as a holder in due course, had brought an action upon a promissory note. The defense was fraud in the inception of the note. The trial court submitted to the jury the question as to whether the plaintiff was a holder in due course. In that case, in addition to the evidence of interested witnesses and the books, there was evidence of disinterested witnesses that the bank had paid value for the note, and no circumstances suggesting *mala fides* on the part of the bank were disclosed by the evidence. There was no evidence showing that the bank was guilty of any neglect, wrongful act, or inexcusable omission which amounted to *mala fides* on its part. It was there said:

"There is nothing in this case showing any bad faith or *mala fides* on appellant's part. Although it is true that, when the title of the transportation company was shown to be defective, the burden devolved upon the appellant to show it was a *bona fide* holder, yet after it had introduced evidence not in any manner contradicted or disputed, showing it to be such a holder, and completely disclosing all the circumstances surrounding the acquisition of its title, and when it appeared from its records, the records of the transportation company, and evidence of disinterested witnesses, that it had paid value for the note, and no circumstances suggesting *mala fides* on its part was disclosed by the evidence thus produced, it then devolved upon the respondent to show that the appellant was guilty of some neglect, wrongful act, or inexcusable omission, which amounted to *mala fides* on its part, sufficient to show its dishonest dealing and prevent it from being held a *bona fide* holder in due course."

In that case it was held that the bank was a holder in due course, and the judgment was reversed and the cause remanded with direction to enter a judgment in favor of the plaintiff.

The evidence in the case now under consideration is equally as convincing as the evidence in that case. The defendant of-

fered no evidence to combat the evidence offered by the plaintiff to establish good faith in the transaction. There are no facts or circumstances from which it could reasonably be inferred that the note was not transferred in good faith and for value. We think the facts in this case bring it within the holding in the case just referred to.

The appellants cite a number of cases which they claim sustain their position, that the question of good faith in the transaction should have been submitted to the jury. Of these cases, the one most nearly in point upon the facts is *Union Inv. Co. v. Rosenzweig, supra.* But that case is distinguishable from the present. There the Union Investment Company, a banking institution, took the note sued upon as indorsee from one of its bank customers. The bank had theretofore extended, and, at the time of the transfer of the note, was extending credit to this customer. The excerpts from the account books showed the account of the indorsers varied from day to day as they drew therefrom and added thereto, and that the note was collateral to the general account. There was no evidence that the indorsers were insolvent. On the contrary it appeared they were carrying on an extended and profitable business. The bank knew the purported consideration of the note, and knew, prior to the commencement of the action thereon, that the makers of the note claimed that the note was procured from them by fraud, and that there was want of consideration for it. With knowledge of these facts, the bank, instead of pursuing the indorsers of the note who were in the state where it conducted business, chose to pursue the makers of the note in a distant state after knowledge that such makers were under no obligation to pay it. In addition to this, the witnesses by which it was sought to show the good faith of the transaction were interested in the result of the action. In that case the question of the good faith in the transaction was by the trial court submitted to the jury, and it was held: "That the court did not err in

submitting the question of the appellant's good faith to the consideration of the jury." In the present case, there is evidence of a disinterested witness supporting the good faith of the transaction; there is evidence that the holder of the note had no means of collecting it other than from the makers thereof; that the indorser of the note was not located in the same state as was the indorsee; that from the letter written by the president of the Kennewick Stock Breeders Association on February 28, 1908, it appears that only a few days before that letter was written had it come to the knowledge of the members of the association that there had been fraud in the inception of the note. The note was transferred on the 31st of January prior. If the makers of the note had not discovered the fraud prior to the time when the note was sold to McLaughlin Brothers, there seems to be no theory, under the facts in this case, which would justify the charging of that knowledge to the indorsee. The other cases cited by the appellants are clearly distinguishable upon the facts from this case.

On the question of the failure of consideration, this claim was based upon the fact that the stallion did not get with foal sixty per cent of the mares which he served, but only about forty-four per cent. The language of the warranty was that the stallion would "get sixty per cent of the producing mares with foal." There is no evidence showing what proportion of the mares served by the stallion were producing mares. It requires no argument to show that every mare which will receive the service of a stallion is not necessarily a producing mare. The appellants failed in their attempt to show failure of consideration. The horse was admittedly a good one, and the only objection to him appears to have been that he did not produce the number of colts which the purchasers claimed they were entitled to under the warranty.

The judgment will be affirmed.

FULLERTON, MOUNT, CROW, and ELLIS, JJ., concur.

[No. 12196. Department Two. March 19, 1915.]

WINTON MOTOR CARRIAGE COMPANY, *Respondent*, v. FRANK S. BLOMBERG, *Appellant*.[1]

JUDGMENT—CONSENT TO ENTRY—VALIDITY—WAIVER OF PROOF—REVIEW. Judgments by consent are valid as between the parties, dispensing with the necessity of proof of the complaint, and, in the absence of fraud or mistake, are not reviewable on appeal.

PLEADING — ANSWER TO AMENDED COMPLAINT — STRIKING MATTERS PREVIOUSLY WAIVED. Where the defendant in an action of replevin for two motor cars waived his counterclaim as to damages for one of the cars, and agreed to judgment in favor of plaintiff for the possession of such car, he could not, in an answer to an amended complaint for the replevin of the other car, interpose a counterclaim for the damages so waived.

JUDGMENT—DISTINCT JUDGMENTS IN SAME CASE—SEPARABLE SUBJECT-MATTER—APPEAL AND ERROR—HARMLESS ERROR. Where there are separable causes of action set up in an action, the entry of judgment by consent as to one cause and continuance as to the other is not prejudicial error, and nothing more than an irregularity when the court has jurisdiction of parties and subject-matter.

APPEAL AND ERROR—NOTICE OF APPEAL—SUFFICIENCY. Where there were two judgments in one action, and appeal was taken from but one, without mentioning the other in the notice, the latter cannot be considered on appeal, in view of Rem. & Bal. Code, § 1719, which provides that the notice shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken.

JUDGMENT—RES JUDICATA—REPLEVIN. In an action to replevin two motor cars, where the parties stipulate in open court that judgment may be entered for the possession of one car and the cause continued as to the other car, and no appeal is taken from the judgment by consent or from an order refusing to vacate same, the judgment is *res judicata* as to all matters relating to the car involved in the consent judgment.

SALES — CONDITIONAL SALES — ACTIONS — DEFENSES — DEFAULT—WAIVER. In an action of replevin for two motor vehicles, conditionally sold and in possession of a vendee in default, the defense of waiver of prompt payment on one car, is properly withdrawn from the jury, where the waiver was in consideration of prompt payment of sums due upon the other car, which payments had not been promptly paid.

[1]Reported in 147 Pac. 21.

Evidence—Parol—Written Contract—Contemporaneous Agreement. Where a conditional sales contract for a motor vehicle without warranty provided that "this contract contains all of the agreements between the parties," evidence of a parol contemporaneous warranty is inadmissible.

Replevin—Proof of Value—Sufficiency. In replevin for property conditionally sold, proof of the amount due under the contract is sufficient proof of the value of the property to uphold a money judgment therefor.

Replevin—Value of Property—Statement in Affidavit. In an action of replevin, the value stated in the affidavit should be taken as the true value at the time of taking, where the defense presents no evidence of a different value.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 27, 1914, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action of replevin. Affirmed.

Peacock & Ludden and *W. W. Barton*, for appellant.

Alex M. Winston, and *Richard B. Harris*, for respondent.

Ellis, J.—This is an action in replevin, commenced July 24, 1913, to recover possession of one sixteen passenger automobile, throughout the record called the large car, alleged to be of the value of $2,733.94, and one seven passenger automobile, called the small car, and alleged to be of the value of $1,063.77.

The small car was purchased by the defendant from the plaintiff on June 18, 1912, under a conditional contract of sale, the purchase price being $3,285. At the time of the commencement of the action, the amount due on this car equaled the value alleged in the complaint. The contract was in writing, contained no warranty, and the last sentence reads: "This contract contains all the agreements between the parties." At the time this action was commenced, the payments stipulated in the contract were four months past due.

The large car was purchased under a similar contract on April 18, 1913, and the payment stipulated in the contract to be made on June 18, 1913, was past due at the time of the commencement of this action.

On July 24, 1913, the cars were seized under the replevin writ, and on August 4, 1913, the defendant, desiring a redelivery of the small car, executed a bond for that purpose. The matter of the justification of the sureties on the bond on that day came before the court, Judge J. Stanley Webster presiding. Judge Webster, considering himself disqualified, had formerly declined to try the case, but with the acquiescence of both sides, consented to hear this matter. The time allowed for redelivery on bond had then expired. The defendant being present in person and represented by his counsel, Mr. Barton, and the plaintiff being represented by its counsel, Mr. Winston, the matter was disposed of by agreement as follows:

"Mr. Winston: If your honor please, in the case of The Winton Motor Car Company, a corporation, against Blomberg, there is a legal question up which your honor declined to hear; I will say that matters have been adjusted between us so that it is merely a matter of form of taking some testimony as to the sufficiency of a surety, whom I have already interrogated and I am satisfied is sufficient; we have agreed that in this case—there were two machines—motor cars—sold upon conditional sale; the plaintiff claiming that the defendant was in default in his payments instituted this action in replevin praying for delivery under our statute; the defendant desires to give a re-delivery bond as to one of the cars and that is agreeable to us, the understanding being that he shall give this re-delivery bond even though the time has passed for it and as to the other car, the other car not being now in controversy, that we may have judgment entered which will be prepared, adjudicating us to be entitled to possession; that is correct, is it not, Mr. Barton?

"Mr. Barton: We don't question either the ownership or possession of the one car, the large car; the only dispute is about the small car; that is the one for which we have given the bond.

"Mr. Winston: Yes, sir, and I simply say that because we have not prepared the judgment at this time. As soon as this bond has been executed, it can be approved later by Your Honor and they can have possession and I will present the judgment to Mr. Barton for his approval."

On the afternoon of August 4, 1913, counsel for plaintiff prepared a judgment following the above quoted understanding and presented it to Mr. Barton for his approval. Mr. Barton refused to agree to this, although he admitted that it followed the agreement previously entered into. On August 6, 1913, plaintiff's counsel notified defendant's counsel of the time and presented the judgment to the court for entry. Judge Webster waited for a couple of hours for Mr. Barton to arrive, and then talked with him over the phone, and finding Mr. Barton had no particular objections to the judgment but simply did not care to approve it until it had been submitted to his associate, Judge Webster finally signed the judgment. As to the small car, the cause was continued.

Thereafter the plaintiff filed an amended complaint reciting the seizure of the two cars, the entry of judgment as to the large car, the redelivery of the small car on the redelivery bond, and also alleged that plaintiff was the owner of and entitled to possession of the small car, and prayed for judgment awarding it possession thereof, or for $1,063.77 and interest, which was alleged to be the value of the small car.

The defendant, in his answer, alleged that, at the time of the sale of each car, the plaintiff agreed to replace without cost to defendant all broken parts on each car within one year from the date of its purchase. As to the large car, he alleged there were many defects in the workmanship and material and that it did not meet the specifications, and set up counterclaims aggregating $4,250. As to the small car, he alleged there were many similar defects, and for these set up counterclaims aggregating $1,638.65. Defendant also alleged that plaintiff had waived prompt payment of the amounts stipulated in the contract for the small car. On

September 26, 1913, upon motion of plaintiff, all allegations in the answer relative to the large car were stricken by the court, Judge Joseph Sessions presiding. On October 7, 1913, defendant moved the court, Judge Bruce Blake presiding, to vacate the judgment theretofore entered. On November 7, the motion was denied. No appeal has been taken either from this judgment or from the order denying the motion to vacate it.

In January, 1914, the cause came on for trial to a jury, Judge Henry L. Kennan presiding. The plaintiff proved the purchase under contract of the small car by the defendant, proved the delinquency in payments and demand for payment or forfeiture of the contract, the demand for payment or forfeiture being by a letter from counsel for plaintiff to defendant on July 15, 1913 (nine days before the commencement of this action), in part as follows:

"This is to advise you that I have been instructed by the company to say to you, and I say to you on its behalf, that unless the over due payments are made in full at the office of the company in this city on or before Saturday the 19th day of July, 1913, that the company hereby elects, under the provisions of said contracts, to take possession of the cars, and I, therefore, if these payments have not been made by Saturday, demand that you deliver possession of the cars to the company at their office in this city. I am authorized and directed to say that unless you either pay or surrender possession of the cars that suit will be brought against you to replevin the same on Monday next.

"If you desire to make any terms or conditions, it will be useless to see me as I have no authority to do anything further than I have indicated. Inasmuch as it may be difficult for you to raise this much money by Saturday, I would suggest that you raise what you can, see the local office, and endeavor to have them communicate with the company and arrange for an extension."

Subject to the objection of plaintiff, the defendant offered testimony to show a contemporaneous oral agreement between the parties whereby the plaintiff agreed to replace with-

out cost to defendant all broken parts on the small car within a period of one year from the date of its purchase. Defendant proved that, within a year of the date of purchase, the frame or chassis of the car broke. Defendant's testimony does not show that this was the result of any defect in the material or workmanship, except that one witness testified that the frame was too light, although he admitted that he had not examined the break closely. Defendant proved that two crank shafts had broken, but this was subsequent to the expiration of the year following the purchase of the car. He also testified to other repairs that were necessary before the expiration of the year, but in none of these did he show that it was due to any defect in the material or workmanship.

Defendant and his wife both testified, over plaintiff's objection, that, at the time of purchasing the large car, the agent waived prompt payment of the several installments due on the small car. The written contract between the parties, however, expressly stipulates: "The Winton Motor Car Company, is not responsible for any agreement or promise other than written or printed on the face of this contract and holds the option of accepting or rejecting the terms and conditions of sale when made by its agents."

At the close of all the evidence, upon motion of plaintiff, the court directed a verdict in favor of the plaintiff, and on January 27, 1914, judgment was entered upon the verdict, adjudging plaintiff the owner of and entitled to the immediate possession of the small car, that defendant deliver the car to plaintiff, and in default thereof that plaintiff have and recover from defendant the sum of $1,090.37 and costs. Defendant's motion for new trial was overruled. He appeals.

The appellant's claims of error may be grouped as follows: (1) that the court erred in refusing to vacate the first judgment disposing of the large car, and in striking the allegations of the answer touching the large car, and in refusing to admit evidence in support of the counterclaim founded thereon; (2) that the court erred in taking the case from the jury

in that there was evidence tending to show that, at the time of sale of the large car, the respondent waived prompt payments on the contract for the small car if payments on the large car were promptly made; (3) that the court erred in not submitting the questions of warranty and breach of warranty to the jury; (4) that there was a failure of proof in that there was no evidence of the value of the small car.

(1) The first contention presents the dominant question in this case. It is manifest that, if the judgment of August 6, 1913, was a valid judgment it foreclosed all claims of the appellant touching the large car, and the court therefore committed no error in striking the counterclaim founded thereon and in refusing to admit evidence thereof. That judgment was entered on the original complaint and the oral stipulation of the parties made in open court. Judgments by consent are valid as between the parties, and in the absence of fraud or mistake, will not be reviewed on appeal. *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328; *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690. The consent to judgment dispenses with the necessity of proof of the allegations of the complaint. *Brown v. Smedley*, 136 Mich. 70, 98 N. W. 857; *Harniska v. Dolph*, 133 Fed. 158; *Beebe v. Beebe Co.*, 64 N. J. L. 497, 46 Atl. 168; *Crouse v. Derbyshire*, 10 Mich. 479, 82 Am. Dec. 51; *Manley v. Johnson*, 85 Vt. 262, 81 Atl. 919; *Indianapolis, D. & W. R. Co. v. Sands*, 133 Ind. 433, 32 N. E. 722. Every issue raised in the subsequent answer to the amended complaint by way of counterclaim for damages for breach of warranty and for a return of the purchase price paid on the large car could have been raised by answer to the original complaint. By his failure to answer the allegations touching the large car in the original complaint, and stipulating, in the words of his counsel, that "the only dispute is about the small car," the appellant waived these claims. Having been waived as matter of defense and counterclaim to the complaint so far as it originally related to the large car, they could not thereafter be asserted as matter of defense and counterclaim to

the amended complaint relating solely to the small car. Having waived these matters in the transaction out of which they arose, he waived them for all purposes.

We find no merit in the claim that the first judgment was a nullity in that there cannot be two judgments in the same action. The subject-matter of the action was capable of segregation, and was so treated by the stipulation. The first judgment disposed of the controversy and correctly determined the rights of the parties touching the large car according to their stipulation. Under the stipulation, that is exactly what would have been done had the same adjudication been included in a single judgment also disposing of the small car. Under these conditions, it was not error to enter the first judgment and continue the case as to the distinct and separable subject-matter still in controversy. *Plummer v. Park*, 62 Neb. 665, 87 N. W. 534; *Collins v. Hines* (Tex. Civ. App.), 100 S. W. 359.

Taking the view most favorable to the appellant's contention, the entry of two judgments, disposing separately of the two distinct matters in controversy, was no more than an irregularity. There was no lack of jurisdiction, either of parties or subject-matter. Neither the first judgment nor the order refusing to vacate was an interlocutory order. The first judgment was final and appealable. So, also, was Judge Blake's order refusing to vacate it. No separate appeal was taken from either of these, nor was either included in or mentioned in the notice of appeal from the last judgment. While two or more appealable orders may be embraced in one appeal, the statute expressly provides that the notice of appeal shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken. Rem. & Bal. Code, § 1719 (P. C. 81 § 1189). We cannot review either the judgment or the order. *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634; *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448; *State ex rel. Dutch Miller Min. & Smelting Co. v. Superior Court*, 30 Wash. 43, 70 Pac. 102.

No appeal of any kind having been taken from the first judgment or from the order refusing to vacate it, that judgment is *res judicata* as to the whole controversy touching the large car. *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955. We find no error in striking the first counterclaim and refusing to submit evidence thereof to the jury.

(II) Our disposition of the first contention disposes also of the second. The alleged waiver of prompt payments on the small car was asserted to be in consideration of prompt payments on the large car. The appellant himself testified that, at the time suit was brought, one installment of $300 was overdue on the large car. The first judgment precluded the assertion of any counterclaim as an offset against this installment. The appellant, therefore, failed to meet the consideration for the alleged waiver. There was absolutely no evidence upon which this phase of the case could have been properly submitted to the jury, except on instruction to find against the appellant.

The kindred claim that the respondent, by accepting partial payments on some of the installments due on the small car, waived the right to declare a forfeiture on the conditional sale contract for that car without demand and notice, does not help the appellant. The evidence was uncontradicted that none of these indulgences occurred after the default on the large car. Even on the appellant's theory, these indulgences must be referred to the supplemental oral agreement which he himself had violated by his failure to make prompt payments on the large car. Moreover, as the evidence shows, demand and notice of forfeiture were actually made and given some nine days prior to suit. We find no error in taking this defense from the jury.

(III) The appellant's testimony touching the alleged verbal warranty of the small car was to the effect that the respondent agreed to replace parts defective in material or workmanship for one year upon delivery of the old parts, transportation charges prepaid, at the respondent's branch

house in Seattle. The only evidence of any defect attributed to workmanship or material was the breaking of the frame or chassis, which it was claimed was too light. This was repaired without cost to the appellant, and no further complaint was made with regard to it until after the commencement of this action. The appellant's evidence did not establish a breach, even had the warranty been admitted by the respondent. It was denied, however, and the evidence touching the warranty was admitted over the respondent's objection that it was an attempt to vary the terms of the written contract by parol evidence. We think that this objection should have been sustained. The conditional sale contract not only contained no warranty, but contained a stipulation that "this contract contains all of the agreements between the parties." Clearly the effort to engraft upon this contract the warranty now claimed was an attempt to vary and contradict the express terms of a written agreement, complete on its face, by a parol contemporaneous agreement. *Buffalo Pitts Co. v. Shriner*, 41 Wash. 146, 82 Pac. 1016; *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. 635, 135 Pac. 472; *Hooven & Allison Co. v. Wirtz*, 15 N. D. 477, 107 N. W. 1078; *Electric Storage Battery Co. v. Waterloo, C. F. & N. R. Co.*, 138 Iowa 369, 116 N. W. 144, 19 L. R. A. (N. S.) 1183, and note.

"Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question." *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 517.

In view of the written contract complete on its face, the court committed no error in refusing to submit evidence touching the contemporaneous verbal warranty to the jury.

(4) The claim that there was no proof to support a money judgment, in that the value of the small car was not proven, merits scant notice. The appellant concedes the rule that, in actions to recover machinery or its value, sold under a conditional bill of sale, the proper measure of its value to the plaintiff is the balance due on the contract price. *Hallidie Mach. Co. v. Whidbey Island Sand & Gravel Co.*, 62 Wash. 604, 114 Pac. 457.

The amount due on the sale of the small car, with interest on the unpaid installments to the time of suit, was clearly established by the evidence to be $1,063.77, the value alleged in the complaint. This, with interest at the legal rate to the date of trial, amounted to $1,090.37, the amount of the judgment. This was sufficient proof under the rule announced in the *Hallidie* case. Moreover, in case of replevin of converted property, it is the established law of this state that the value stated in the affidavit will be taken as the true value at the time of the taking, unless the defense gives some evidence showing a different value. *Peterson v. Woolery*, 9 Wash. 390, 37 Pac. 416; *Armour v. Seixas*, 80 Wash. 181, 141 Pac. 308.

No good reason can be assigned for applying a different rule to the allegation contained in a complaint for the recovery of property sold on conditional sale, or its value, in the absence of evidence that the actual value was different from the amount due on the contract. The appellant offered no evidence of a different value from that alleged and proven by the respondent. The evidence offers no question of value for submission to the jury.

The judgment is affirmed.

CROW, FULLERTON, MOUNT, and MAIN, JJ., concur.

[No. 12379. Department One. March 19, 1915.]

HAMMOND LUMBER COMPANY, *Respondent*, v. COWLITZ COUNTY *et al.*, *Appellants*.[1]

TAXATION—ASSESSMENTS — DOUBLE TAXATION — ACTIONS — CONDITIONS PRECEDENT—PAYMENT OF TAX. While relief in equity against double taxation is not available unless the payment of one tax is shown, the tax receipts for taxes assessed against certain real estate for specified years shows the payment of one tax on the land including the improvements thereon; under the assumption that the assessor performed his duty of including the improvements as required by Rem. & Bal. Code, § 9102.

SAME—IMPROVEMENTS—LOGGING ROAD—DOUBLE TAXATION — REASSESSMENT OF OMITTED PROPERTY—VALUATION BY ASSESSOR—CONCLUSIVENESS. A logging railroad not used as a common carrier, and not occupying any separate and distinct right of way outside of the land upon which it was used for logging purposes, constitutes either real estate or improvements on real estate; and an assessment of the real estate is presumed to include the logging road, on the theory that the assessor has done his duty, under Rem. & Bal. Code, § 9102, requiring him in assessing real property to include "the value of all improvements and structures thereon;" hence, after payment of such real estate tax, the subsequent assessment of the logging road (as property omitted from taxation) will be cancelled as double taxation.

TAXATION—ASSESSMENTS—VALUATIONS — REVIEW. The assessor's valuation for the purpose of taxation will not be disturbed in the absence of evidence to show fraudulent, arbitrary or capricious action.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered June 26, 1914, upon findings in favor of the plaintiff, in an action to cancel a tax, tried to the court. Affirmed.

Homer Kirby, for appellants.

Magill, McKenney & Brush, for respondent.

HOLCOMB, J.—Suit by respondent to cancel taxes. The respondent was the owner, during the years 1908 to 1911, inclusive, of certain tracts and parcels of land described in its complaint, in Cowlitz county, Washington, and paid the

[1]Reported in 147 Pac. 19.

taxes for each and all of said years to said county. During all of said years there was a certain logging railroad owned by respondent, located and constructed wholly upon and across the tracts and parcels of land described in its complaint. Said railroad was at all times, and is now, used and operated by respondent for the sole purpose of hauling and transporting respondent's logs from the place where the same had been cut on respondent's said land to the Columbia river, and has never been used to carry freight or passengers for hire, and has never been used by the general public.

All of appellants' claims of error are comprehended in one question: Had the logging railroad been assessed for the years mentioned and the taxes paid thereon by the respondent, so that the subsequent attempt to tax the same by the appellants constituted double taxation? The respondent alleged, the appellants admitted, and the court found, that the respondent during all of said years was the owner of said described tracts of real estate; that it was also the owner of the said logging railroad during all of said years; that said logging railroad was, during all of said time, wholly located and constructed upon and across the said tracts or parcels of lands; that it never had been used to carry freight or passengers for hire, and had never been used by the general public, but had always been owned and used exclusively by the respondent, and operated solely for the purpose of transporting its logs from places where the same had been cut on respondent's land to the Columbia river.

The respondent alleged, and the court found, that the respondent tendered and paid to the treasurer of said county, before the same or any part thereof became delinquent, all real estate taxes which were or had been levied upon the said tracts or parcels of land for the years 1908, 1909, 1910, and 1911, and that respondent also tendered and paid to said county for said years above mentioned all personal property taxes which had been levied on or assessed against its personal property for said years. These last allegations, the

appellants in their answer denied, except that they admitted that respondent paid its personal taxes as therein alleged. Respondent alleged, and the court found, that the appellants unlawfully, wrongfully, and without any authority or power, and contrary to the law, assessed and levied what purported to be a tax upon or against the logging railroad of respondent lying and being across the said real estate, specifying the amounts thereof for each of said years. Appellants admitted said allegation, except that they denied that the said taxes were assessed wrongfully and without authority or power.

Appellants admit, to begin with, that the railroad, as it existed during all said years, was real estate. They contend, however, that it should have been assessed separately as improvements on the land, and that, because it was not so assessed it was not assessed at all, and that the payment of the taxes on the land did not comprehend payment of taxes on the railroad. The respondent introduced its tax receipts, showing that it paid taxes in full on the lands described for each and every one of the years in controversy, and also its tax receipts showing that it paid all personal taxes that had been assessed against it.

The claim of double taxation is not available in a court of equity, unless the party first shows that he has paid one tax before he asks to be relieved from the other. *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 482. This logging railroad, not being a common carrier and as such constituting a distinct and separate entity as property, and not occupying any separate and distinct right of way outside of the land upon which it was laid, was certainly real estate or improvements on real estate, the same as would be buildings or fences or other structures upon real estate. The appellants contend that merely showing the payment of the taxes upon its real estate or upon respondent's personal property for the years mentioned, as shown by tax receipts, was not sufficient; that it was necessary also for the respondent to show that it paid

the taxes that were assessed, or should have been assessed, upon the logging railroad. Appellants say:

"From none of the various tax receipts introduced in evidence can it be ascertained that plaintiff was paying upon a railroad. On the other hand the receipts read plain that plaintiff was paying on the property therein described."

Appellants have admitted in their brief that the logging railroad constitutes real estate. The tax receipts, therefore, do not show that the respondent was not paying upon a railroad. Of course, respondent admits that it has not paid the taxes which have been subsequently assessed by the taxing officers of appellant county upon this railroad as a separate entity, for that is the very gist of its action—that said taxes are illegally assessed and constitute double taxation. The assessor who assessed the property for the years in controversy is presumed to have done his duty. Rem. & Bal. Code, § 9102 (P. C. 501 § 121), provides that the assessor "shall actually determine as nearly as practicable the true and fair value of each tract or lot of real property listed for taxation and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description of property."

"The assessor in placing valuations upon property for the purpose of assessment acts in a *quasi* judicial capacity, and the law presumes that he has done his duty in a proper manner . . ." *Vancouver Water Works Co. v. Clarke County*, 55 Wash. 112, 104 Pac. 180.

In the absence of any evidence or sufficient evidence to show fraudulent, arbitrary, capricious or collusive conduct on the part of the assessor, the valuations of the assessor are final and cannot be disturbed. *Carlisle v. Chehalis County*, 32 Wash. 284, 73 Pac. 349; *Edison Electric Ill. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132.

"Rights, easements, franchises, and appurtenances belonging to or connected with a particular parcel of land are to be considered as a part of it, for purposes of assessment, and its

value should be estimated in connection with such advantages and as enhanced thereby. So also all fixed and permanent buildings and other improvements on land are part of it and must be included in its appraised value for taxation." 37 Cyc. 1012.

We must, therefore, assume that the logging railroad in question had been assessed by the assessors for the years in controversy as part and parcel of the real estate. If it was then existent upon the land, it was as plainly discernible to the assessing officer upon examining the land as a house, tree, or fence would be. We therefore think that the attempt of the appellants to add the tax to the logging railroad for the years in question constitutes not an assessment of omitted property, but manifestly double taxation.

The judgment of the lower court was right and it is affirmed.

MORRIS, C. J., PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 12220. Department Two. March 20, 1915.]

THE STATE OF WASHINGTON, *on the Relation of William Vance, Plaintiff*, v. A. W. FRATER *et al.*, *Respondents*.[1]

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—CLASS LEGISLATION—COURT STENOGRAPHER — STATUTE AUTHORIZING APPOINTMENT. 3 Rem. & Bal. Code, § 42-13, excluding from the operation of the act for the appointment of official court stenographers counties containing a population of 200,000, is not such an arbitrary classification of the counties as to constitute a violation of the constitutional provisions designed to secure the equal protection of the laws and to prevent class legislation.

Application filed in the supreme court August 12, 1914, for a writ of mandamus to compel the superior court for King county, Frater, J., *et al.*, to appoint an official court reporter. Writ denied.[2]

[1]Reported in 147 Pac. 25.

[2]Rehearing pending.

Vanderveer & Cummings, for plaintiff.

John F. Murphy and *Robert H. Evans*, for respondents.

FULLERTON, J.—This is an application made upon notice for a peremptory writ of mandamus, directed to the defendants as judges of the superior court of King county, commanding them to appoint an official court reporter. The defendants, through their counsel, have demurred to the application, and the cause is before us upon the question whether the facts stated therein justify the issuance of the writ. We find it unnecessary to set forth the facts recited in the petition, as they suggest but a single question, namely, the applicability of the provisions of the act of March 19, 1913 (Laws of 1913, p. 386; 3 Rem. & Bal. Code, § 42-1 *et seq.*), to the county of King.

The act in question, by its first section, makes it the duty of "each superior court judge in counties and judicial districts in the state of Washington having a population of over thirty thousand inhabitants to appoint a stenographer to be attached to the court holden by him." The last section of the act (Id., §42-13), provides that the "act shall not apply to any county having a population of two hundred thousand, or over." It is conceded by the relator, and the court knows judicially, that the county of King has a population in excess of two hundred thousand, and that the act as written does not apply to that county.

It is the relator's contention that the classification made of the counties by the legislature is not founded upon any just distinction between the separated classes, and is in consequence arbitrary and in violation of those clauses of the constitution designed to secure the equal protection of the laws and to prevent class legislation. The inquiry suggested by the contention is narrowed, however, by our decision in *State ex rel. Lindsey v. Derbyshire*, 79 Wash. 227, 140 Pac. 540, where we held the act operative as to the counties to which it ostensibly applied. Discussing the nature of the section now

in question, it was there suggested that it was a limitation upon the general classification made in the first section of the act rather than an additional classification; and it was held, when so considered, not to affect the constitutionality of the act in so far as it was made operative, even though the limitation might be considered in violation of the constitution, as in such a case the limitation alone would be rejected.

The present inquiry is, therefore, should the limitation exempting from the operation of the act counties containing a population of 200,000 or more be rejected as violative of the constitution. So treating it, we are not convinced that the limitation is invalid. To classify counties and districts of the state according to population and to enact legislation operative as to one class and inoperative as to another, is a common practice of the legislature; common not only to the legislature of this state, but to the legislatures of other states of the Union having constitutional provisions like, and similar in effect to, our own. Such legislation has been upheld by the courts with almost entire unanimity. While in most, if not every instance, it has been difficult to see any just distinction between the classes which approach the mean of the dividing line, a just distinction is easily discernible between the extremes. Take for example the present instance. Probably no just reason can be given for saying that a court in a county or judicial district having a population of 30,000 should have an official stenographer, while a court in a county or district having a population of 29,999 should not, yet such legislation is upheld from the necessities of the case. There being a sound reason why a court in a county or district having a large population should have an official stenographer, while a court in a county or district which is small should not, the legislature, in enacting laws to meet the needs of the state as a whole, is compelled to draw more or less arbitrary lines of division. Where such is the case, the court looks to the act as a whole, to its general scope and purpose, rather than to the immediate line of division, and upholds the act if it can

be discovered that the classification or limitation is not wholly arbitrary.

Looking at the present limitation in this light, we cannot think it wholly arbitrary. A reason can exist why a court of a county or district having a population of 30,000 might require an official stenographer, while a court in a county or district having a population of 1,000 or less, or of 200,000 and over, might not require one. It may be that, in the smaller district, the business of the court is such that the services of a stenographer can be dispensed with altogether without detriment to the public interests, however convenient the services of one may be. It may be that the public interests require the services of a stenographer in the other classes, and that there is not sufficient private employment in the intermediate class to engage the attention of a competent stenographer, rendering it difficult and costly to obtain one when the necessity therefor arises, which difficulty is overcome by giving a stenographer constant employment; while in the larger district, it may be that competent stenographers are always within reach and the public employment of one not thus a necessity. Other reasons may have suggested themselves to the legislative mind. But, be this as it may, the reason need not be all-pervading. It is enough if it be not wholly arbitrary; and, as we say, we do not so find it in this instance.

The application is denied.

MAIN and CROW, JJ., concur.

MOUNT and ELLIS, JJ., concur in the result.

[No. 12034. Department Two. March 22, 1915.]

McGOWAN BROTHERS HARDWARE COMPANY, *Respondent*, v. FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Appellant*.[1]

STATES—BUILDING CONTRACTS—PERFORMANCE — FINAL ACCEPTANCE —ACTION ON BOND—MATERIALMEN. The architect's final certificate of construction is a conclusive acceptance of a building erected under the direction of the state board of control, where the contract gave the architect complete control of the work, and provided for payments on the architect's certificates, the final payment to be made when the work was completed, and accepted by the "owner and architect," and that no certificate except the final one shall be conclusive evidence of the performance of the contract; hence a materialman, in order to maintain an action on a bond given to secure the performance of the contract, must file a claim within thirty days after such acceptance of the work, as required by Rem. & Bal. Code, § 1161.

SAME — CONTRACTS — FINAL ACCEPTANCE — DELEGATION TO ARCHITECTS. Where the state board of control has been given power to contract for public buildings, without limitations forbidding such delegation, it may delegate to the architects the right to determine when the work contracted for conforms to the contract and specifications, and to finally accept the work if the contract was satisfied in that regard.

STATES — CONTRACTS—ACCEPTANCE BY ARCHITECT — IMPEACHMENT. An architect's certificate of the completion of a state building cannot be impeached, in the absence of a showing of fraud on his part, by the fact that the date of completion was recited as of a later day in a labor report of the state's construction superintendent.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered July 1, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for appellant.

Merritt, Oswald & Merritt, for respondent.

[1]Reported in 147 Pac. 44.

ELLIS, J.—This is an action to recover upon the same surety bond given to secure the performance of the same contract as involved in the cases of *Wheeler, Osgood Co. v. Fidelity & Deposit Co.*, 78 Wash. 328, 139 Pac. 53, and *Union Iron Works v. Strauser*, 82 Wash. 51, 143 Pac. 446.

The contract was let by the state, through its board of control, to T. Strauser and Son, for the erection of the administration building of the Northern Hospital for the Insane, at Sedro Woolley. For the facts touching the character and provisions of the contract, the completion of the building by the contractor, and the acceptance thereof by the architect, reference is made to the opinion in the *Wheeler, Osgood Co.* case, in which a detailed statement appears.

The plaintiff in the present action furnished material for the building aggregating $2,260.43, and filed its claim against the bond with the state board of control on January 8, 1913. The case was tried to the court without a jury. Judgment was entered for the plaintiff. The defendant, Fidelity & Deposit Company of Maryland, appeals.

In the *Wheeler, Osgood Co.* case, as pointed out in the *Union Iron Works* case, the principal question involved was whether the board of control, in the contract made with Strauser and Son, delegated to the architect the power to accept the building. In the first mentioned case, that question was decided in the affirmative, and on the evidence it was held that the architect did, in fact, accept the building as completed on December 6, 1912. A petition for rehearing was denied.

In the *Union Iron Works* case, the further question of law, whether the board could legally delegate to the architect the right to accept the building when it should conform to the contract, was involved. We held that:

"The board of control had the power to authorize the architects to determine whether the building conformed to the plans and specifications, and if they found that the contract was satisfied in that regard, to accept the work."

We further held that:

"The board having constituted the architects its agent while acting within the powers conferred, the act of the architects becomes the act of the board."

An exhaustive petition for rehearing was filed in that case, seeking a review of the question of law involved, and of the evidence as to when in fact the architect accepted the work. After a careful consideration, that petition was denied.

The evidence in this case was, in every material particular, the same as that in the *Union Iron Works* case. The same questions, both of law and fact, presented in that case are presented here. We have again reviewed the evidence. It is clear that the entire board of control, with one of the architects, inspected the building on December 2, 1912, and found it complete with the exception of certain minor items. The architect remained on the ground for two or three days, and after returning to Seattle, was informed by telephone by Dr. McLeish, the superintendent of the hospital, that the items of work above referred to had been performed, whereupon the architects, on December 6, 1912, made their final certificate, and on December 7, 1912, transmitted it to Dr. McLeish with direction to hold the same until a release was obtained by the contractors from their surety. If this was not an acceptance, then there has been none to this day, so far as the record shows. The fact that, on December 17, 1912, the board notified the Union Trust & Savings Bank of Spokane, through which the contractors had secured their bond, that the building had been accepted and that the final estimate would be paid as soon as the contractors had made settlement of the premiums due the state industrial insurance commission, does not alter the matter further than as tending to show that the surety had notice that the building had in fact been accepted prior to that time.

The fact now urged, that a labor report of the state's construction superintendent was received on December 18, advising that the final work on the building had been done

after the date of the architects' certificate, we regard as immaterial. It could not impeach the certificate in the absence of some showing of fraud on the architects' part. Nothing of the kind appears.

We find nothing in the record which warrants a reversal of the holding in the *Wheeler, Osgood Co.* and *Union Iron Works* cases that the building was accepted on December 6, 1912, and that the respondent's notice filed on January 8, 1913, was tardy.

Following those decisions, we reverse this judgment and remand the cause for dismissal as to the surety company.

CROW, FULLERTON, MOUNT, and MAIN, JJ., concur.

[No. 12244. Department One. March 22, 1915.]

HENRY L. BUNCK *et al.*, *Respondents*, v. ANGUS McAULAY *et al.*, *Appellants*.[1]

FRAUD—MEASURE OF DAMAGES—EVIDENCE. In an action to recover damages for fraudulent representations by the vendor in the sale of a hotel lease and furniture for $18,500, the value of the property sold at the time of sale, as bearing on the measure of damages, was a question for the jury, where there was evidence which tended to show that the furniture, if new, would be worth about $8,500, but was worth much less at the time owing to its condition, that the lease extended for something over a year, and that there was no profit in the business, which was a losing venture at the time the sale was made.

SAME — FRAUDULENT REPRESENTATIONS — CURING ERRONEOUS INSTRUCTIONS. In an action for false representations, an instruction allowing recovery if the plaintiffs relied thereupon "or were expected so to do" in connection with an instruction just preceding it explicitly defining defendants' liability as dependent on representations made to plaintiffs "with intent to deceive them and to induce them to rely thereupon, and that plaintiffs did in fact rely thereon and were damaged;" and other instructions to the effect that fraud will not be presumed, etc., taken as a whole, sufficiently states the law with reference to the necessity of plaintiffs' reliance upon the representations.

[1]Reported in 147 Pac. 33.

Trial—Instructions—Comment on the Facts—Withdrawal of Issues. A charge to the jury stating that "defendants having made no counterclaim or charge," and withdrawing certain evidence thereon, etc., is not prejudicial as a comment on the facts or as withdrawing from the jury defendants' counterclaim or offset, when in fact no counterclaim was pleaded.

Pleading — Answer — General Issue — Counterclaim. It is not error to sustain a demurrer to an answer setting up affirmative matter admissible under the general denial, but which might have been properly pleaded as a counterclaim.

Fraud — Fraudulent Representations — Measure of Damages—Instructions. It is proper to instruct that the measure of damages for misrepresenting the value of property sold is the difference between the purchase price and its value at the time of the sale where it would have been worth the agreed price, if it had been as represented.

Appeal and Error — Verdict — Conclusiveness. Where the evidence, though conflicting, sustains the verdict, it will not be disturbed on appeal.

Trial—Improper Argument of Counsel. A remark by counsel in arguing to the jury that the attorneys on the other side dare not open up their client's record "since he came back from prison," while improper, was cured by the court's instruction to the jury to disregard the remark, the argument not being evidence, and that it was the duty of the jury to exercise the same degree of fairness and impartiality that they would expect from the court, if they as individuals were submitting their cases to the court.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 25, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for fraud. Affirmed.

Milo A. Root and *Gay & Kelleran*, for appellants.

Ryan & Desmond, for respondents.

Mount, J.—This action was brought by the purchasers of the lease and furniture of a hotel against the vendor for damages because of alleged fraudulent representations. The cause was tried to the court and a jury, and resulted in a verdict of $7,500 in favor of the plaintiffs. A judgment was

entered upon the verdict, from which judgment the appeal is prosecuted.

The defendants had owned the hotel lease and furniture since February, 1912. For some time prior to June 1, 1913, the plaintiff Henry L. Bunck had negotiated with the defendant Angus McAulay for the purchase of the lease and furniture of the hotel. About that date, the deal was consummated and the plaintiffs purchased at the agreed price of $18,500, which was paid as follows: The plaintiffs transferred a tract of land in Chehalis county to the defendants at a valuation of $4,000, paid $2,800 in cash, and gave a mortgage for $900 on another piece of property; they also gave back to the defendants a mortgage for $10,200 on the furniture in the hotel. They received a credit of $600 on account of commissions paid to the real estate agent who brought the parties together.

The plaintiffs allege in their complaint that they were wholly inexperienced in the hotel business, which the defendants well knew; that the defendant Angus McAulay fraudulently represented that the hotel had, for a long time, been earning a net income of over $1,000 per month; that there were a large number of transient guests; that the defendant Angus McAulay exhibited the register containing the names of the guests, and misrepresented the number of rooms rented to permanent guests, the amount of the rental received therefor, and that the guests would remain permanently in the hotel; that the representations were made to induce the plaintiffs to purchase, that they relied upon these representations, and had no opportunity to investigate or obtain knowledge thereof; that the hotel had not earned $1,000 net per month, nor any other sum, but had been operated at a loss; that the names on the hotel register so exhibited had been fraudulently and falsely placed thereon for the purpose of defrauding the plaintiffs; that many of the hotel guests were co-conspirators of the defendants, paid no rent, and kept their rooms for the purpose of defrauding the plaintiffs; that the real value of

the property was $8,300, whereby the defendants had been, and were, damaged in the sum of $10,200.

The defendants, in answer to the complaint, after denying generally the charges of fraud and overreaching, alleged affirmatively that the plaintiffs were to pay $2,800 in cash, $900 in a solvent real estate mortgage, transfer 80 acres of land represented by the plaintiffs to be worth $4,000, and which was in fact worth only $1,000, to execute the $10,200 mortgage described in the complaint, and to be allowed the said sum of $600 cash paid to the agent; that the plaintiffs made their own inquiries and relied thereon; that one Van Dusen was a part owner in the hotel by conveyance of an interest from the plaintiffs, and was therefore a necessary party; and that the plaintiffs negotiated a second mortgage to the Northern Bank & Trust Company of Seattle in the sum of $3,000.

A demurrer to this affirmative matter was sustained, for the reason that the facts therein stated might all be shown under a general denial. Whereupon the defendants filed an amended answer substantially the same as the original, except omitting the affirmative matter.

A number of errors are assigned which we will consider in the order as stated in the appellants' brief. In the instructions to the jury the court stated the measure of damages to be:

"The difference between the purchase price of said hotel and its value at the time of the sale."

It is conceded that the purchase price was sufficiently shown, for both parties agree that it was to be $18,500. But it is argued by the appellants that there was no proof of the actual value at that time. The evidence, however, tended to show that the value of the furniture in the hotel at that time, if new, would be worth about $8,500; but that in its condition at that time was worth much less than that sum. The evidence also tended to show that the lease upon the premises extended for a period of something more than a year, and also that

there was no profit in the business; that instead of making a profit, it was a losing venture at the time the sale was made. It is apparent, we think, that the jury was authorized to find upon this evidence, if they believed it to be true, that the value of the property sold to the plaintiffs was much less than the agreed price, which was based upon false and fraudulent representations relied upon by the plaintiffs. We are satisfied, therefore, that there was sufficient evidence to go to the jury upon the question of value at the time of sale.

The court instructed the jury as follows:

"The fact that the plaintiffs may or may not have given a chattel mortgage to the Northern Bank & Trust Company is immaterial and in no wise relieves him from the obligation to pay the purchase price of said hotel, nor does it relieve the defendants from their obligations to pay damages for any misrepresentations they, or either of them, may have made to plaintiffs, if you find from a fair preponderance of the evidence that the defendants made any misrepresentations and that the plaintiffs relied thereupon or were expected so to do by the defendants, and were damaged, then your verdict would be for the plaintiffs."

It is argued by the appellants that this instruction is erroneous because of the use of the words, "or were expected so to do." These words are singled out of this instruction. Standing alone, they might be considered erroneous. But the court had already just previously instructed the jury as follows:

"The court further instructs you that if you find from a fair preponderance of the evidence that the defendants made any representations to plaintiffs as alleged in the complaint with intent to deceive them and to induce them to rely thereupon and that plaintiffs did in fact rely thereon and were damaged, then and in that event the court instructs you that your judgment must be for the plaintiffs, . . ."

Taken as a whole, there can be no doubt that the court did not mean to tell the jury that they might find for the plaintiff if misrepresentations were made which were simply ex-

pected to be relied upon but which were not in fact relied upon. Taking all the instructions together, it is clear that the court instructed the jury that they must find that the misrepresentations were in fact relied upon.

It is further contended that this instruction is erroneous because it tells the jury that:

"If you find from a fair preponderance of the evidence that the defendants made any misrepresentations and that the plaintiffs relied thereupon or were expected so to do by the defendants, and were damaged, then your verdict would be for the plaintiffs."

But the court had previously instructed the jury that:

"Fraud will not be presumed and must be established by proof either direct or circumstantial; if by the latter, the circumstances relied upon must be such as to reasonably consist only with the intent to defraud and to be in some degree inconsistent with an honest intent. It cannot be established by strained inference, or rest upon conjecture.

"The court further instructs you that the plaintiffs in this case, before they are entitled to a verdict at your hands upon the ground of fraud inducing the making of a contract must establish such fraud by clear and convincing evidence."

And more to the same effect. We are satisfied that the objections to this instruction made by the appellants are without merit.

The court also instructed the jury as follows:

"The court further instructs you that the defendants, having made no counterclaim, or charge, that the plaintiffs have failed to keep their part of the bargain, I instruct you it is immaterial as to how or where the plaintiffs obtained the purchase price, and you are further instructed to disregard all testimony showing or tending to show that the plaintiffs borrowed any of the purchase price from any outsider, whether upon a chattel mortgage or otherwise."

It is claimed that this instruction is a comment upon the facts; and further, that it withdraws from the jury the defendants' counterclaim or offset. No counterclaim was in fact pleaded. It is true in the original answer there was a

statement to the effect that the plaintiffs "represented certain land to be worth $4,000, but which in truth and in fact was only worth $1,000, and no more." But this does not rise to the dignity of a counterclaim. It was not alleged nor claimed upon the trial that this difference in value, if true, should be offset against any damages which the plaintiffs were entitled to recover. The fact very clearly appears upon the evidence that the plaintiffs had never seen the land, and so stated to defendants before the trade, and made no representations as to what it was worth. There was evidence to the effect that the defendants had made an investigation of the tract of land, and took it at the estimated value of $4,000 after the examination. We are satisfied, therefore, that the court properly instructed the jury upon this question. The instruction was not a comment upon the facts. It simply excluded certain evidence from the consideration of the jury; and this exclusion, we think, was proper.

The appellants next argue that the court erred in sustaining the demurrer to the original answer. We have already in substance determined this question.

The appellants next argue that the court erroneously instructed the jury upon the measure of damages, as follows:

"In the event your verdict is for the plaintiffs, in determining the amount of damages they have suffered, if you find they have suffered damage, I instruct you that the measure of damages herein would be the difference between the purchase price of said hotel and its value at the time of the sale."

The appellants argue that this is not the correct measure of damages. They rely upon the rule as stated in *Hunt v. Allison*, 77 Wash. 58, 137 Pac. 322, where this court said:

"Where property is sold and the purchaser subsequently brings an action charging fraudulent representations, the measure of damages is the difference between the value of the property transferred at the time of the sale and what its value would have been if it had been as represented."

There is no substantial difference between the rule as stated in *Hunt v. Allison* and the one given in this case. The substance is the same. If the property had been as represented, its agreed value was $18,500. The difference between that sum and its real value at the time of sale was the measure of damages, and that is what the court told the jury.

The appellants next argue at length that the evidence is insufficient to sustain the verdict. We have read the abstract of the record with some care and conclude that there is sufficient evidence in the record to justify the jury in its finding that fraudulent representations were purposely made, and were relied upon by the plaintiffs in purchasing the property. This, of course, was a disputed question of fact. But there is ample evidence in the record, if believed by the jury, to justify the finding. It would serve no useful purpose to set the evidence out in this opinion.

During the argument to the jury the plaintiffs' attorney said:

"Defendants' attorneys dare not open up McAulay's record since he came back from prison."

An exception was taken to this remark. The court thereupon instructed the jury to disregard the remark, and told the jury in substance that the argument of counsel was not evidence and when not supported by the evidence should be disregarded; that it was the duty of the jury to exercise the same degree of fairness and impartiality that they would expect from the court if they as individuals were submitting their cases to the court. During the progress of the trial, it was shown without objection that the defendant McAulay had served a term in the penitentiary of this state, and had been pardoned therefrom. While the remark of counsel may have been improper, we are satisfied that when the court instructed the jury as it did to disregard the remark and not to consider remarks of that character, whatever error was made by counsel was cured by the court. We think no prejudice could have resulted therefrom.

The other errors assigned we think are not of sufficient moment to justify further consideration. The instructions given by the court were fair and fully covered the questions involved, and were, we think, correct statements of the law. We find no prejudicial error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12373. Department One. March 22, 1915.]

E. M. PRENTISS *et al.*, *Appellants*, v. OTTO BOGART *et al.*, *Respondents*.[1]

HUSBAND AND WIFE—MISCONDUCT OF HUSBAND—LIABILITY OF WIFE. A wife is not liable for acts of her husband amounting to malicious prosecution and false imprisonment.

FALSE IMPRISONMENT — MALICIOUS PROSECUTION — PARTIES LIABLE. Threats made by a creditor, showing malice or motive harbored against the debtor, would not render him liable for false imprisonment or malicious prosecution, committed by a trustee in bankruptcy, where there was nothing to show that the malice of the creditor controlled or contributed to the act of the trustee.

MALICIOUS PROSECUTION—PARTIES LIABLE—PROBABLE CAUSE. Under Rem. & Bal. Code, § 2601, defining larceny as the taking of property with intent to deprive or defraud the owner thereof, and Rem. & Bal. Code, 2303, defining an owner as any person who has a general or special property, in the whole or any part thereof, or the lawful possession thereof, either actual or constructive, a trustee in bankruptcy, in possession of property claimed and later decided to be exempt, is entitled to maintain his possession until the referee's finding is reversed; and hence has probable cause for instituting a prosecution for larceny thereof against the owner who took the same in an unlawful way.

SAME—WANT OF PROBABLE CAUSE—REMEDY BY CIVIL ACTION. The fact that a person resorts to the criminal courts for the theft of an article, when he might have had recourse to a civil action for its recovery, cannot be urged by the accused as want of probable cause for the prosecution.

[1]Reported in 147 Pac. 39.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered June 2, 1914, upon granting a nonsuit, dismissing an action for malicious prosecution, tried to the court and a jury. Affirmed.

C. H. Graves, for appellants.

Stiger & Dally, for respondents.

CHADWICK, J.—Many facts are brought into this case by counsel, but from the view we take of it it will not be necessary to recite all of their troubles. It is enough to say that appellant Prentiss, who will be referred to as appellant, being indebted to the Park Place Produce Company, and being subjected to legal process for the collection of their debt, made a voluntary assignment in bankruptcy. Part of his personal property consisted of a wagon. This he claimed to be exempt. The referee in bankruptcy held it to be not exempt. The trustee in bankruptcy, the respondent E. P. Walker, demanded possession of the wagon on the evening of the 24th of June. Possession being refused, under the advice of counsel and upon the theory that the goods were exempt, the trustee took manual possession and left the wagon at or near the place of the Park Place Produce Company. At about six o'clock on the next evening, it was discovered standing in the road by appellant. About eleven o'clock that night appellant hitched his team to the wagon and took it away. On the next morning the trustee again demanded possession. Appellant refused to surrender the wagon to the trustee, whereupon respondent Walker caused a charge of petit larceny to be lodged against appellant. He was arrested, tried by a jury, and acquitted by the justice of the peace having jurisdiction of the case. This action was brought to recover damages for malicious prosecution and false imprisonment.

Before we take up the real merit of the case, we desire to say that we know of no rule, and none has been suggested to us, that would warrant the court in holding the wives of the

respondents liable. They were properly exonerated by the court below.

Appellant undertakes to hold the respondent Bogart by showing certain threats made by him, when endeavoring to collect the debt due the Park Place Produce Company, Bogart being the manager thereof. Whatever malice or motive Bogart may have harbored against plaintiff, there is nothing in the testimony to show that it in any way controlled or contributed to the act of the respondent Walker. We agree with the trial judge that Bogart was not liable to answer for false imprisonment or malicious prosecution.

Having disposed of three of the appellants' contentions, the only inquiry remaining is whether the judgment of the trial court was a proper judgment with reference to the respondent Walker.

It is appellant's contention that the property was exempt and that he had title to it; that this fact was known, or should have been known, to the respondent Walker, and inasmuch as the Federal district court, upon an appeal to it from the finding of the referee, thereafter reversed that finding and adjudged the property to be exempt, respondent cannot now say that there was probable cause. The trial judge properly held that, although title was at that time legally in the plaintiff, the trustee nevertheless had a special property which he could protect by any of the means or methods which the law makes available. However the case in bankruptcy was ultimately decided, the property was *in custodia legis* at the time appellant took it from the trustee.

Admitting, for the sake of argument, that respondent would not be heard to urge a defense of probable cause if the arrest had been made under the old statutory definition of petit larceny, or as it was defined at common law, we think there can be no question that there was sufficient to sustain the defense of probable cause under our present definition of larceny and petit larceny. Rem. & Bal. Code, §§ 2601, 2605 (P. C. 135 §§ 695, 703).

Larceny is defined as the taking of property with intent to deprive or defraud the owner thereof. Laws of 1909, p. 997, § 349 (Rem. & Bal. Code, § 2601). An owner is any person who has a general or special property in the whole or any part thereof, or the lawful possession thereof, either actual or constructive. Laws of 1909, p. 902, § 51, par. 16 (Rem. & Bal. Code, § 2303).

At the time the trustee took possession of the property under the ruling of the referee, he was the owner of it and entitled to maintain his possession as against all the world, until the finding of the referee was reversed by a court of competent jurisdiction. Having invaded the right of the owner in an unlawful way, appellant made himself subject to the charge; or, in other words, there was probable cause.

We have not overlooked the contention of plaintiff that it was the duty of the trustee to begin a civil action for the recovery of the wagon, and that he should not be sanctioned in his resort to the criminal side of the court. It is a sufficient answer to this contention to say that, where a man pursues a remedy that is open to him under the law, he cannot be charged because he might have pursued some other remedy more favorable to his adversary. Nor does it well become plaintiff to make this contention. Had he pursued his right upon the civil side instead of taking the property in the manner in which he did, the courts would not have been burdened with this controversy.

Other questions are discussed that might be material if there were sufficient evidence to connect respondent Bogart with the arrest of appellant. He being exonerated, they will require no discussion.

Affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and MOUNT, JJ., concur.

[No. 12437. Department Two. March 22, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES A. SNYDER, *Appellant*.[1]

WITNESSES—COMPETENCY—DIVORCED SPOUSES. Under Rem. & Bal. Code, § 1214, providing that neither spouse shall be a witness for or against the other without the latter's consent, "nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage," a divorced wife is a competent witness against her former husband as to acts and facts occurring during the marriage relation, when her testimony does not involve communications made by him to her arising from the confidence induced by such relation; hence a wife, after divorce, may testify as to facts corroborating a charge of rape committed by the former husband on his stepdaughter.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered January 7, 1914, upon a trial and conviction of rape. Affirmed.

O. O. Felkner, for appellant.

F. A. Kern and *Newton Henton*, for respondent.

MAIN, J.—The defendant in this case was, on the 1st day of November, 1913, by information, charged with the crime of unlawfully, feloniously, carnally knowing a certain female child under the age of 15 years, and not the wife of the defendant. In the information, the crime is alleged to have been committed on or about the 1st day of June, 1911. To the information the defendant pleaded not guilty. The jury returned a verdict of guilty as charged. A motion for a new trial being made and overruled, judgment was entered upon the verdict and sentence imposed. From this judgment and sentence, the appeal is prosecuted.

The female child mentioned in the information was the stepdaughter of the defendant; the mother of the child was his then wife. Subsequent to the time when the crime is al-

[1]Reported in 147 Pac. 38.

leged to have been committed, and prior to the date of the trial, the wife of the defendant had been divorced from him. Upon the trial, and over the objection of the defendant, the divorced wife was permitted to testify to certain corroborative acts and facts. At the time when the crime was committed, the law making corroboration necessary in cases of this character had not been repealed. Laws of 1913, ch. 100, p. 298.

The facts in this case, as shown by the testimony of the witnesses on behalf of the state, are of such a revolting character that they will not here be further detailed. The principal question in the case is whether a divorced wife can testify against her former husband as to facts or acts occurring during the marriage relation. The statute, Rem. & Bal. Code, § 1214 (P. C. 81 § 1033), after providing that the husband shall not be examined for or against his wife as a witness without the consent of the wife, nor the wife for or against the husband without the consent of the husband, continues:

"Nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage."

Under this statute the divorced wife was a competent witness against the appellant, except as to communications made by one to the other during the marriage. *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

"Any communication," as mentioned in the statute, means confidential communications, or such as are induced by the marriage relation. *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819; *In re Van Alstine Estate*, 26 Utah 193, 72 Pac. 942; 4 Wigmore, Evidence, p. 3263. The acts and facts testified to by the former wife were in no sense confidential communications, or such as were induced by the marriage relation. One fact to which she testified was, that on a certain occasion she found her then husband in the act of sexual intercourse with her daughter, the complaining witness.

The other questions presented in the appellant's brief have been considered, but in none of them is there substantial merit.

The judgment will be affirmed.

MORRIS, C. J., FULLERTON, CROW, and ELLIS, JJ., concur.

[No. 12393. Department Two. March 22, 1915.]

THE STATE OF WASHINGTON, *on the Relation of the Board of State Land Commissioners, et al., Appellants*, v. OLIVER C. McGILVRA *et al., Respondents*.[1]

PUBLIC LANDS—SHORE LANDS—PREFERENCE PRIVILEGES — APPEAL—CANCELLATION—STATUTES. The "cancellation act" of 1899 (Rem. & Bal. Code, §§ 6751-6753), providing for the withdrawal and cancellation of preference rights to purchase "tide lands" of the first class, and authorizing the dismissal of appeals taken from the board of state land commissioners in which no trial has been had for a period exceeding two years, applies also to, and is incorporated into the "shore land act" of 1907, Laws 1907, p. 4 *et seq.*, providing for the disposition of "shore lands" on Lakes Washington and Union, with a preference right of purchase to abutting owners "under existing laws," in view of the constant reiteration of the last quoted words, and § 5 of the act (Laws 1907, p. 6), wherein it is declared that "the provisions of any existing law of this state relating to the selection, survey . . . and disposition of the state's granted, school, tide, oyster and other lands or harbor areas, or any other law of this state applicable thereto, shall control and govern," the sale and disposition of the shore lands covered by the act, except as modified by the provisions of the act; there being no provision in the "shore land act" itself for the cancellation of preference rights or the dismissal of appeals in proceedings thereunder, except as the act incorporates "existing laws."

PUBLIC LANDS—SHORE LANDS—PREFERENCE PRIVILEGES — APPEAL—CANCELLATION — TOLLING STATUTE. The statutory withdrawal and concellation of preference privileges to purchase tide lands, for delay in prosecuting appeals from the board of state land commissioners, declared by Rem. & Bal. Code, § 6751, and the authority to the At-

[1]Reported in 147 Pac. 40.

torney General given by Id., § 6752, to move the dismissal of such appeals, cannot be abrogated or suspended by independent litigation touching such shore lands nor by any agreement of the state land commissioner to allow the appeals to rest *in statu quo*.

Appeal from orders of the superior court for King county, Gilliam, J., entered May 20, 1914, denying motions to cancel and withdraw preference privileges to purchase shore lands and to dismiss appeals from orders of the board of state land commissioners relating thereto. Reversed.

The Attorney General and *R. E. Campbell, Assistant*, for appellants.

E. M. Farmer and *Oliver C. McGilvra*, for respondents.

ELLIS, J.—These are appeals prosecuted on behalf of the state of Washington and the board of state land commissioners from orders of the superior court of King county, denying motions made by the *Attorney General*, on behalf of the state, to cancel and withdraw certain preference privileges to purchase shore lands, and to dismiss appeals to the superior court from certain orders of the board touching such preference privileges.

The facts, so far as material, are these. On March 21, 1908, the board of state land commissioners, the board of state tax commissioners and the *Attorney General*, pursuant to the provisions of chapter 3, Laws of 1907, p. 4, filed an appraisal of the shore lands bordering lakes Washington and Union, in King county, as provided in that act. On April 9 and 10, 1908, separate applications to purchase certain of these shore lands were filed with the commissioner of public lands by the respondents here. These applications conflicted with one another in that the applicants had applied for, and claimed the preference right to purchase, certain of the shore lands that were included in other applications filed in accordance with chapter 3, Laws of 1907, p. 4. In view of these conflicts, the applicants were required by the board of state land commissioners to furnish proof of their ownership of the

uplands in front of the lands which they had so applied to purchase. The proofs submitted were held sufficient to support preference purchase rights to only a part of the lands included in the several applications. The board therefore, on December 24, 1908, entered an order awarding to the several applicants the right to purchase the shore lands in front of and adjoining the uplands owned by them as shown by the written proofs submitted, but in each instance excluding a part of the shore lands applied for. All of the applicants appealed to the superior court of King county from this order, excepting as to two of the applications, with which we are not concerned. The appeals were from that part of the order rejecting the applications as to part of the lands and awarding the right to purchase such lands to other applicants. The notices of appeal and appeal bonds were filed in the office of the commissioners of public lands on January 22, 1909.

Upon the filing of these notices and bonds and stipulations for consolidation, transcripts of the proceedings before the state land commissioners were prepared in accordance with the stipulations, and forwarded to the clerk of the superior court for King county on February 20, 1909, for filing. By letter addressed to Oliver C. McGilvra, one of the applicants, who was then and is now acting as one of their attorneys, the applicants were advised of the making, preparation and forwarding to the clerk of these transcripts for filing. On June 30, 1909, Mr. McGilvra paid to the land commissioners the cost of the preparation of the transcripts and acknowledged receipt of the notices of the forwarding of the transcripts to the clerk of the superior court. The transcripts, however, were not filed until December 6, 1911. They constitute the two cases involved in this appeal. On January 20, 1914, no trials or other proceedings than those above mentioned having been had or taken, the *Attorney General*, on behalf of the state of Washington and the board of state land commissioners, served upon the applicants, respondents here, motions

to dismiss the appeals to the superior court, and for cancellation and withdrawal of the preference privileges claimed by the applicants. At the same time, thirty days' notice of the intention of the state to enforce such withdrawal and cancellation was served upon the attorney for the applicants. These motions were regularly brought on for hearing before the superior court for King county, and on May 20, 1914, orders denying the motions and refusing to cancel and withdraw the preference privileges to purchase, claimed by the applicants, were signed and entered. These appeals followed. They come to this court by agreement as one consolidated cause.

The sole question presented is this, do the provisions of §§ 6751 to 6758, inclusive, Rem. & Bal. Code (P. C. 477 §§ 177, 179, 181), touching dismissal of appeals and cancellation of preference privileges of purchase relating to tide lands of the first class, which for convenience we shall designate as the "cancellation act," apply also to appeals involving preference privileges to purchase shore lands of the first class, as accorded by chapter 3, Laws of 1907, p. 4, which we shall designate as the "shore land act."

The cancellation act declares:

"In all cases involving the prior privilege of purchase of tide lands of the first class, wherein appeals have been or shall be taken from any decision of the board of state land commissioners to the superior court and in which no trial has been or shall be had in said superior court for a period of time exceeding two years after the date of the taking of such appeal, the preference privilege of purchase given to the abutting upland owners and to improvers of such tide lands, shall be and the same is hereby declared to be withdrawn and canceled: *Provided, however*, That before any such withdrawal or cancellation shall take place or effect as to any tide lands involved in any such appeal now pending a notice of ninety days shall be given to all parties to the appeal by the attorney general on behalf of the state of the intention of the state to enforce such withdrawal and cancellation." Id., § 6751.

"The attorney general of the state is authorized and directed to enter on behalf of the state, motions of dismissal in all such appeals now pending or hereafter to be prosecuted: *Provided, however*, That as to appeals hereafter taken thirty days' notice shall be given by the attorney general to the parties to such appeal of the intention of the state to enforce such withdrawal and cancellation." Id., § 6752.

"All lands so withdrawn shall be re-appraised and sold in the manner prescribed by law for the appraisement and sale of unapplied-for tide lands of the first class." Id., § 6753.

The shore land act relates to the disposition of shore lands of the first class on lakes Washington and Union, in King county. Section 1 provides for the survey, appraisal and platting of such shore lands. Section 2, according preference privileges of purchase, reads as follows:

"Within twenty (20) days following the filing of the final appraisal of said shore lands with the commissioner of public lands, the owner or owners of lands abutting or fronting upon said shore lands, and all other persons, firms, or corporations having the preference right of purchase, as provided by any existing law of this state, may apply for the purchase of said shore lands in the mode and manner required or authorized by any existing law of this state, except as modified or amended by the provision of this act. Such application shall be in writing and filed within said twenty (20) days, and if at the end of said twenty days there shall be no conflicting applications filed, the applicant shall be deemed to have the right of purchase. And if at the expiration of said twenty days two or more applications shall have been filed for any tract conflicting with each other, such proceedings shall be had as is authorized or required by any existing law, except as may be changed by this act: *Provided, however*, that in case of contest, interest shall be charged upon the appraised value at the rate prescribed by law from the date of the expiration of said twenty day period, and such interest shall be paid at the time the first installment of principal is made, and no contract shall issue unless such interest be paid. Any of said shore lands remaining unsold and where there is no pending application for the purchase of the same, shall be sold in the same manner as provided by law for the sale of school and granted lands." Laws 1907, p. 5, § 2.

The repeated use of the words "any existing law," without any limitation to laws relating to shore lands *eo nomine*, found in this section, was manifestly intended as an adoption of any provision in the existing body of the law applicable to the appraisal, sale, preference rights of purchase, and contests touching state lands, including tide lands, where different or modified provisions are not found in the shore land act itself. This conclusion is made inevitable by § 5 of the shore land act which declares:

"The provisions of any existing law of this state relating to the selection, survey, management, reclamation, lease and disposition of the state's granted, school, tide, oyster and other lands or harbor areas, or any other law of this state applicable thereto, shall control and govern the establishment of the harbor lines, survey, platting, appraisal, sale and disposition of the shore lands mentioned in this act, except as modified, altered or repealed by the provisions of this act." Laws 1907, p. 6, § 5.

At the time this shore land act was passed, the cancellation act embodied in §§ 6751 to 6753, *supra*, was an existing law. By its terms that law only applies to cases involving preference privileges of purchase of *tide lands* of the first class. No cognate matter or modified provision controlling the withdrawal and cancellation as contained in this section is found in the shore land act. If, therefore, the declaration of § 5 of the shore land act is not a sufficient adoption of the cancellation act, then it is not sufficient to adopt any provision of any then existing law relating to tide lands, though it expressly mentions any existing law relating to the management and disposition of tide lands. To hold that § 5 does not adopt the cancellation act would nullify the explicit declaration of § 5 and make it an adoption of no existing law touching tide lands unless such law also expressly included shore lands, in which case the adoption would be a mere superfluity.

It is clear that, if the shore lands here involved were tide lands of the first class, the preference privilege claimed by

the respondents would be forfeited and the court would necessarily have decreed their cancellation and withdrawal and the dismissal of the appeals to the superior court. These appeals were taken on January 22, 1909, approximately five years before the motions to dismiss and applications for cancellation, thus clearly falling within the limitation expressed in the cancellation act touching tide lands of the first class. If, therefore, the provisions of the cancellation act relating to the management and disposition of the state's tide or other lands are, by the shore land act, incorporated into and made a part of that act, it follows, also, of necessity, that the court should have decreed the cancellation and withdrawal of the preference privileges here involved and ordered the dismissal of the appeals. There is not a single provision in chapter 3, Laws of 1907, p. 4, the shore land act, which either expressly or impliedly negatives the intention expressed in § 5 to adopt the cancellation act as an existing law to govern and control the termination of preference privileges asserted under the shore land act. On the contrary, the shore land act, taken as a whole, evinces the clear intention of the legislature to afford every means offered by any existing law for a speedy disposition of these lake shore lands. A review of the provisions of the shore land act itself shows this speedy disposition one of its dominant purposes. The act shows, first, a shortening of the period within which applications to purchase by preference claimants must be filed from thirty to twenty days; second; that preference privilege claimants are required to pay interest on the original appraised value of these shore lands from the filing of their applications to the date of completion of purchase; third, that the proceeds from the sales of these lake shore lands are to be placed in a special fund known as the Alaska-Yukon-Pacific Exposition fund. By subsequent chapters of the laws of 1907 (pp. 7-11), appropriations are made from this special fund. We have recently sustained the right of the board to reappraise these shore lands. *Bouckaert v. State Board of Land Com'rs, ante* p. 356, 146 Pac. 848.

But the legislative intention, evidenced by these provisions to facilitate the speedy disposition of these shore lands, would be balked for lack of coercive power and procedure unless the provisions of the cancellation act are construed as made a part of the shore land act by the broad terms of adoption of "any existing law," found in §§ 2 and 5 of the latter act.

No provision is made in the shore land act for appeals to the superior court in contests involving preference privileges of purchase, other than the broad declaration above quoted that all existing laws relating to the management, sale and disposition of the state's lands, enumerating certain classes and expressly including tide lands but not shore lands *eo nomine* "or any other laws of this state applicable thereto," shall control and govern the appraisal, sale and disposition of shore lands. Obviously the power to dismiss a halting appeal and to cancel and withdraw the preference right of purchase, pending for years uncompleted by payment, is essential to any disposition of the state's shore lands, speedy or otherwise, just as it is to the disposition of the tide lands of the first class. We are constrained to hold, not only by the clearly apparent purpose of the act, to be gathered from all of its terms, but also by the express declaration contained in §§ 2 and 5 thereof, that the shore land act has adopted the earlier cancellation act as an integral part of its own provisions and procedure.

We find no merit in the argument that the act of 1901, Laws of 1901, p. 98 *et seq.* (Rem. & Bal. Code, § 6616 *et seq.*), covering the subject of appeals from the board of state land commissioners, was all that was adopted by § 5 of the shore land act, in that the act of 1901 referred to shore lands as well as to tide lands. The act of 1901 expressly saved from its general repealing clause (section 9) the provisions of the cancellation act of 1899, p. 120 (Rem. & Bal. Code, §§ 6751 to 6753 inclusive). It left that act still in full force as to tide lands of the first class. Since § 5 of the shore land act adopts the provision of *any* existing law relating to tide

lands, it just as clearly adopts the act of 1899 as it does the act of 1901, even more clearly in fact, since the act of 1901, which specifically mentions shore lands, would apply without any adoption in the shore land act of 1907.

Nor do we find any merit in the claim that the words "applicable thereto" in § 5 limits the adoption of existing laws to those expressly mentioning shore lands. It means just what it says, "any existing law . . . relating to the . . . management . . . and disposition of . . . tide . . . and other lands . . . or any other law of this state applicable thereto." The words "applicable thereto" relate to the classes of lands enumerated. They could not relate to shore lands and exclude tide lands, since shore lands are not specifically mentioned, while tide lands are.

The claim that the delay in prosecuting these appeals in the superior court of King county was due to certain independent litigation in the Federal courts touching these shore lands, pending which the former state land commissioner agreed to allow the appeals to the superior court to rest in *statu quo*, does not aid the respondents. The cancellation act, which we have found was adopted in and made a part of the shore land act, not only authorizes but directs the *Attorney General* "to enter, on behalf of the state, motions of dismissal in all such appeals now pending or hereafter to be prosecuted," when not brought to trial "for a period of time exceeding two years after the date of the taking of such appeal;" and § 6751 expressly declares the withdrawal and cancellation in such cases. No independent litigation touching such shore lands, nor any mere understanding with the state land commissioner, can be held sufficient to abrogate or suspend the direct command thus laid upon the *Attorney General* acting on behalf of the state, nor to postpone the direct statutory withdrawal and cancellation. If such considerations were sufficient to toll the positive limitation contained in § 6751, then almost any excuse would enable the preference

privilege claimant to file his appeal and let it stand indefinitely, speculating on an advance in value of the shore lands, risking nothing but interest on the original appraised value. In the absence of legislative enactment to that effect, we can read no such exception into the law.

The order of the lower court is reversed, and the cause is remanded for dismissal of the appeals of the respondents pending in the superior court and a cancellation and withdrawal of the preference privileges asserted.

MORRIS, C. J., FULLERTON, CROW, and MAIN, JJ., concur.

[No. 12245. Department One. March 22, 1915.]

THOMAS MORGAN, *Appellant*, v. JOHN B. HART *et al.*, *Respondents*.[1]

JUDGMENT—RES JUDICATA—QUESTIONS CONCLUDED. An action for the recovery of damages resulting from the breach of a contract relating to the financing and control of a corporation is barred by the judgment of dismissal "with prejudice" in a former action involving the same parties and subject-matter, wherein it was sought to compel an accounting for moneys advanced by some of the parties for the purpose of acquiring an interest in the corporation.

SAME. The fact that plaintiff in the second suit was joined as a defendant in the first suit, along with his present adversary, for the reason that he refused to join as plaintiff, would not affect the efficacy of judgment in the prior equitable suit as *res judicata*, since his rights adverse to the present defendants could have been as fully adjusted therein in his capacity as defendant as if he had been one of the plaintiffs.

SAME. The fact that plaintiff has introduced in his complaint the element of fraud of the principal defendant in bringing about a settlement following the prior suit, is not the injection of a new issue, but merely the anticipation of a defense which might be made against the claims of plaintiff, and hence cannot be considered as affecting the *res adjudicata* of the judgment in the former suit involving the violation by the principal defendants of the original contract between all the parties.

[1]Reported in 147 Pac. 26.

JUDGMENT—DISPOSITION OF CASE. A judgment of dismissal with prejudice is sufficiently certain to form a bar to a subsequent action involving the same parties and issues, as it in effect determined that the defendant was not accountable to the adverse parties therein.

JUDGMENT—CONCLUSIVENESS — PARTIES CONCLUDED. The fact that the plaintiff in the second suit did not file an answer or cross-complaint in the former action would not change the force and effect of a judgment of dismissal with prejudice therein, where it appears from the record that he was informed of the allegations of the complaint and consented to the rendering of a judgment with prejudice upon the issues tendered.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered July 10, 1914, upon the pleadings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

E. C. Million and *W. H. Abel*, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondents.

PARKER, J.—The plaintiff, Thomas Morgan, commenced this action in the superior court for King county seeking recovery of damages against John B. Hart, claimed to have resulted from the alleged breach of a contract relating to the financing and control of the Bella Coola Development Company, a corporation, of Seattle, Washington, the stock of which Hart and his associate, Williams, had acquired control, and in which other parties to the contract were by its terms to have an interest. The other parties to the contract were, by Morgan, made parties defendant to this action because of their refusal to join as plaintiffs. In his answer, Hart pleaded as his third affirmative defense that there had been a former adjudication of the claimed rights of Morgan sought to be litigated in this action. Morgan demurred to this plea, which demurrer was by the court overruled. Thereupon Morgan filed his reply to the new matter set up in the affirmative defenses, including the plea of former adjudication. Thereupon Hart moved for judgment upon the pleadings, resting his motion particularly upon his plea of former

adjudication and the insufficiency of Morgan's reply thereto. The case being submitted to the court upon this motion, it was granted, and judgment rendered accordingly in favor of Hart. No complaint is made that Morgan was not given an opportunity to amend his reply. He is manifestly standing upon his demurrer to Hart's plea of former adjudication and upon his reply thereto. Evidently he rests principally upon his demurrer to the plea of former adjudication. From this disposition of the cause, Morgan has appealed to this court.

On December 23, 1905, John B. Hart, as party of the first part, and Thomas Morgan, James M. Hackett and E. B. Shields, as parties of the second part, entered into a contract looking to the financing, control, and their acquiring interests in the capital stock of the Bella Coola Development Company. Facts material to this controversy appearing in the recitals and conditions of this contract, which is made part of the complaint, in substance, are as follows:

The company has a paid up capital of 1,000,000 shares of the par value of one dollar each. It then owned certain valuable timber rights in British Columbia. Hart and one Williams then owned or controlled all of the capital stock of the company. It then had certain obligations and requirements to perform, calling for the expenditure of a large sum of money, which it was necessary to provide for the discharge of in order to perfect its timber rights in British Columbia. The company then also needed additional funds to construct manufacturing plants and develop its business. Following the recital of these facts in the contract, it was thereby agreed, in substance, as follows: The parties of the second part were to furnish to be expended for these necessary purposes, $45,000 as a loan, to be repaid in money or mortgage bonds of the company which it was contemplated might be issued in the future. Hart was to cause to be transferred and delivered to Morgan 75,000 shares of the capital stock of the company; to Hackett, 38,000 shares; and to Shields, 38,000 shares. Hart was to retain for himself 150,000 shares,

and Williams was to retain for himself 150,000 shares. The company was then agreed to be indebted to Hart and Williams in the sum of $70,000, which was to be paid in money or mortgage bonds of the company should they be issued as contemplated. Hart was to hold the remainder of the capital stock of the company and sell the same to raise funds to promote its business, and "should all the remainder of the capital stock of said company not be used for the purpose of acquiring money with which to construct the manufacturing plants and industries as herein mentioned or as may be agreed upon in the future, then said remainder of said capital stock of said company shall be divided equally between all the parties hereto."

The contract does not specify what portion of the $45,000 was to be furnished by each of the second parties thereto, this being by the terms of the contract a joint obligation. The rights of Morgan, Hackett and Shields, as parties of the second part under this contract, upon their performance of the conditions thereof as therein specified, may be summarized as follows:

(1) They would be entitled, each, to the specified number of shares of the capital stock of the company.

(2) They would be entitled to repayment of the moneys advanced by them in cash or bonds of the company.

(3) Each would be entitled to his proportion of the remaining shares of the capital stock, not necessary to be sold by Hart for the promotion of the company's business. Other facts appearing in the complaint, in so far as they are necessary to be noticed here, are the following:

"Immediately after entering into said agreement the defendant Hackett paid to said defendant Hart the sum of $15,500, and the defendant Shields paid to said defendant Hart the sum of $5,500, and that the plaintiff paid to said Hart the sum of $15,000. That at the time said plaintiff paid said sum of $15,000 to said Hart, it was agreed between the plaintiff and said defendant Hart that the said sum would

be and was received as full performance of said contract on the part of this plaintiff."

The money so paid to Hart was expended by him in the interest of the company, as contemplated in the contract. The complaint continues:

"The said defendant Hart has at all times refused to deliver to this plaintiff or to said Hackett and Shields any of the stock of said company or give them any notes or bonds or any other evidence of indebtedness, and has further at all times refused to give plaintiff an accounting of said monies, or otherwise to inform the plaintiff as to the method and manner in which the same has been spent.

"The said defendant Hart, was, at the time of the entering into said contract, and ever since has been, a director and president of said corporation, Bella Coola Development Company, and the said Hart has obtained and retained all of the stock of said corporation."

On or about the 23d day of October, 1909, Hart caused to be transferred to the Ocean Falls Company, Ltd., a British Columbia corporation, all of the assets of the Bella Coola Development Company, receiving therefor shares of stock of the Ocean Falls Company, Ltd., and cash, which he has retained. In April, 1910, a settlement was had between Hart and Morgan as to their respective rights, Morgan receiving in settlement certain shares of preferred stock of the Ocean Falls Company, which settlement, it is alleged, was induced by the false and fraudulent representations on the part of Hart. The complaint continues:

"That the said Ocean Falls Company, Ltd., have issued bonds to the amount of $3,000,000, of which have been sold and are still outstanding the sum of $1,750,000, and that the said company is indebted in addition thereto over the sum of $400,000 and that its stock, both common and preferred, have become valueless and it is insolvent.

"That the defendants, James M. Hackett, E. B. Shields and A. E. Williams, are made parties defendant herein for the reason that they refuse to join as parties plaintiff."

The complaint contains no allegation of damages in any sum, but concludes with a prayer as follows:

"Wherefore plaintiff prays judgment against the defendant Hart, in the sum of $50,000, together with interest thereon at the legal rate, and for his costs and disbursements."

Whether we regard this action as and for an accounting or for recovery of damages, Morgan is manifestly resting his claimed rights as against Hart upon the theory that Hart has ignored his rights under the contract of December 23, 1905, and proceeded to dispose of the property of the Bella Coola Development Company and appropriate the proceeds to his own use as though Morgan no longer had any rights under that contract. The matter of the alleged settlement of the differences between Hart and Morgan, and the alleged fraud practiced by Hart therein, does not go to the main controversy, but only anticipates a defense which Hart might make against Morgan's claims. So the problem here is, do the admitted facts, as disclosed by the pleadings in this case, show a former adjudication adverse to Morgan upon his claimed rights which he seeks to enforce in this action.

We now notice the uncontroverted facts appearing in the allegations of Hart's third affirmative defense, being his plea of former adjudication. On October 6, 1907, Hackett and Shields commenced an action in the superior court for King county against Hart, Morgan and Williams and the Bella Coola Development Company, seeking an accounting and an adjustment of the rights and equities of all parties to that action touching their rights under the contract of December 23, 1905, and their relations to the Bella Coola Development Company. The facts appearing by the allegations of the complaint in that action, made part of Hart's plea of former adjudication in this action, so far as necessary to be here noticed, may be summarized as follows:

The contract of December 23, 1905, is set out in that complaint in full, so there appears therein all the facts

shown by the recitals and conditions of that contract as shown by the complaint in this action. The payment of the different sums to Hart by Morgan, Hackett and Shields in pursuance of the terms of the contract was alleged in that complaint as in this complaint. The expenditure of this money by Hart in promoting the interests of the company, as contemplated by the contract, was alleged in that complaint substantially as in this complaint, though the proper expenditure of all the money is challenged in some respects. Other allegations, including the prayer of the complaint, are as follows:

"That said Hart has refused to deliver or cause to be delivered to either of these plaintiffs or said Morgan any of the stock of said company or to give him any bonds, notes or other evidence of said indebtedness, and has further refused to give the plaintiffs any accounting of the said moneys or to otherwise inform plaintiff as to the method and manner in which the said moneys have been invested, . . .

"That the said Hart has refused at all the times since the execution of said contract to deal with these plaintiffs for the purchase of their logging outfit, and has refused to recognize that plaintiffs have any right under said contract; but on the contrary declare that the plaintiffs have forfeited all rights under said contract or the right to have any of said money repaid to them by reason of the failure of the plaintiffs and the said Morgan to pay the full sum of $45,000 mentioned in said contract.

"That the said Hart, for the purpose of inducing these plaintiffs to enter into said agreement, did falsely represent to these plaintiffs that the said company was indebted in the amount of $4,000; and that it was necessary to settle other obligations to the amount of $4,000; and that these defendants relying upon said representations signed said contract and advanced said money, but they have been unable ever since to obtain from said Hart a statement as to such indebtedness and such obligations, and allege the fact to be that there was no indebtedness owing by said company, nor any obligations to be paid at the time of entering into said agreement.

"That said Hart has refused to co-operate with the plaintiffs and said Morgan in an effort to raise the balance of said money.

"That at the time of entering into said agreement, the said Hart falsely represented to plaintiffs that said company was indebted to him, the said Hart, in the sum of $70,000, and that it was indebted to the defendant Williams in the sum of $70,000, while in truth and in fact, said company was not indebted to either said Williams or said Hart in any amount whatever.

"That the defendant Hart was at the time of entering into said contract a director and president of said company, and the defendant Williams was at the time of entering into said contract a director and secretary of said company, and that at all times since entering into said contract said defendants Hart and Williams have continued to act as such officers and had the sole control and management of the affairs of the defendant company, and have refused to furnish plaintiffs with any information as to the financial condition of the company.

"That in order to adjust the equities between the parties hereto and protect the rights of these plaintiffs, it is necessary that a receiver be appointed for said company and that the defendants and each of them be required to make an accounting showing the items of expenditure by them and each of them in connection with the business affairs of said company, and especially that they be required to furnish plaintiffs with a complete and full accounting of all the moneys which have been paid under said contract.

"That plaintiffs have been unable to get any statement from the said Hart or the said Williams, as to what disposition has been made, if any, of the said capital stock of said corporation.

"That the defendant Thomas Morgan has refused to join with plaintiffs in this action and for that reason he is made the defendant herein.

"Wherefore plaintiffs pray for judgment of this court requiring these defendants to furnish an accounting of all the moneys received by them and all disbursements made of such moneys, in connection with the business affairs of the defendant company, and that they be required to turn over to the plaintiffs their share of the capital stock of said com-

pany, and that the plaintiffs have judgment against the defendant and each of them for whatever may be found owing to the plaintiffs, and that a receiver be appointed for the defendant company to take charge of, manage its affairs and wind them up and that the plaintiffs have any other further and different relief to which they may be entitled."

No answer was filed in that action by any of the defendants, but all parties moved for and consented to the entry of a judgment of dismissal therein "with prejudice," that motion and the stipulation accompanying the same, made a part of Hart's plea of former adjudication in this action, reading, with the signatures thereto, as follows:

"Comes now the defendants and move the court for an order dismissing the above entitled suit with prejudice; the motion being made on the files and records in this cause and on the stipulation below following.

"(Signed) John B. Hart
"A. E. Williams
"Bella Coola Develop. Co.
"Thos. Morgan
"By John B. Hart
"Attorney for Defendants

"Stipulation

"It is hereby stipulated and agreed by and between the plaintiffs and defendants that the above entitled cause may be dismissed with prejudice."

"(Signed) J. M. Hackett
"E. B. Shields
"John B. Hart
"A. E. Williams
"Bella Coola Develop. Co.
"By John B. Hart

"I ask for a dismissal of this cause with prejudice.

"(Signed) Thos Morgan."

This was, in effect, a general appearance by all the parties, including Morgan, as well as a stipulation for the entry of a final judgment therein. Thereafter judgment was entered in that action, made part of Hart's plea of former adjudication in this action, as follows:

"This cause coming on regularly for hearing on the motion to dismiss as made by the defendants, which is based on the files and records of this cause and on the stipulation entered into between the plaintiffs and the defendants and the court having duly considered the motion, and being fully advised in the premises,

"It is now and here ordered, adjudged and decreed:

"That the above entitled cause be and the same is now and here dismissed with prejudice. It is further ordered, adjudged and decreed that neither party recover costs herein.

"Done in open court this 21st day of April, 1910."

These two complaints, it seems to us, plainly state the same grounds for relief as against Hart. They were both manifestly framed upon the theory that Hart was liable to Morgan, Hackett and Shields, as parties of the second part to the contract of December 23, 1905, because of his violation of the terms of that contract by ignoring their rights thereunder. In other words, both of these complaints seek to secure rights under this contract; and this we think would be true, though the first action seeks an accounting and the second should be regarded as an action for damages only. In both, the right for relief is rested upon the contract and the same wrongful acts of Hart done in violation of the rights of Morgan, Hackett and Shields, the parties of the second part thereto. That the judgment of dismissal in that action, being "with prejudice," was a final adjudication in Hart's favor as to the claims made against him by Hackett and Shields in the former action is, of course, plain. It is insisted, however, that the judgment is not a final adjudication as against Morgan, this plaintiff. The argument seems to be that Morgan was not a party to that action adverse to Hart, being named as a defendant with him. The fact, however, that Hart and Morgan were both named as defendants in that action does not, in view of its nature and the relief there sought, prevent their interests there involved being adverse to each other. The very object, as plainly disclosed by the allegations of the complaint and the prayer

thereof, was to determine the rights of all of the parties thereto, each as against all others, whether plaintiffs or defendants. Morgan was a necessary party thereto, and was made a defendant because of his refusal to join as plaintiff. It was not practicable to have an effective accounting by Hart without considering and determining Morgan's rights under the contract as well as the rights of the others. Indeed, the necessity of Morgan being made a party to that action is not disputed here by his learned counsel, who even considers Hackett and Shields necessary parties to this action by reason of their interest in its subject-matter, since they are made defendants in this action because of their refusal to join as plaintiffs, though the prayer is only for a money judgment against Hart.

In *Corcoran v. Chesapeake & Ohio Canal Co.*, 94 U. S. 741, Justice Miller, speaking for the court, said:

"It is said that Corcoran and his co-trustees, the canal company, and the state of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.

"The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of distribution of the net revenue of the canal company, and that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree."

In *Waldo v. Waldo*, 52 Mich. 91, 17 N. W. 709, Justice Sherwood, speaking for the court, dealing with facts presenting in substance this same problem, said:

"The purpose and object of the bill of complaint in this case is to obtain a decree establishing the title in fee to the

lands therein mentioned, in complainant and Mary Allen as children and heirs at law of deceased. It appears from the record that Mary Allen, in May, 1881, filed her bill of complaint, making the parties to this suit defendants therein, for the purpose of accomplishing the same object sought by the bill in this case; that the case was finally heard on appeal in this court, on the merits, and the complainant's bill dismissed. See *Allen v. Waldo*, 47 Mich. 516.

"From the facts as they now appear before us, the complainant should have joined with his sister as a party complainant in the first suit, but failing to do so, he was properly made a party defendant therein, and as such, is subject to all the legal consequences necessarily resulting therefrom. The complainant was not only a party to that suit and the adjudication therein, but privy in blood and estate with the complainant in the same. Both were alike interested in the subject-matter of the litigation; both claimed under the same conveyance and as heirs at law of the same ancestor. They each claimed, not separate and distinct moieties, but equal, undivided interests in the entire property; and we think that if one is concluded by the final decision made in this court in the former case, then equally so is the other. *Prentiss v. Holbrook*, 2 Mich. 376; *Hale v. Chandler*, 3 Mich. 535; Cooley, Const. Lim. 47-51, and cases cited; 1 Greenl. Ev. §§ 180, 322, 323, 535, 536; Herm. on Estoppel, §§ 46-49, 59.

"The right now claimed by complainant could have been as fully asserted and maintained in the former suit as in this. It was competent for the court in that case, upon the pleadings and such proofs as were proper in the case, to make a decree determining and establishing the rights and interests of each of the parties without the necessity of a cross-bill or other proceeding for affirmative relief. 1 Barb. Ch. Pr. 339; *Thurston v. Prentiss*, 1 Mich. 194; *Elliott v. Pell*, 1 Paige 262; *Jones v. Grout*, 10 Paige 348: The complainant was a necessary party in the first suit—see Story's Eq. Plead. (6th ed.) §§ 72, 150 and cases there cited,—and being such party he was a party to every issue joined and litigated in it that could in any way affect his interests or his rights, and must be concluded by the decree upon those issues, and if he did not maintain his rights the decree is no

less binding so long as he had the opportunity and neglected to do so."

See, also, *Georgia R. & Banking Co. v. Wright*, 124 Ga. 596, 53 S. E. 251; *City of El Reno v. Cleveland-Trinidad Paving Co.*, 25 Okl. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; *Louis v. Brown Township*, 109 U. S. 162; 1 Van Fleet, Former Adjudication, page 576.

Counsel for Morgan contend that the issues in this action are materially different from those in the former action, in that in this action Hart is charged with fraud in bringing about a settlement of their differences. We have already noticed that this is nothing more than an anticipation of a defense in the nature of accord and satisfaction which Hart might make against the claims of Morgan. This alleged new element of fraud does not in the least affect the merits of Morgan's claims against Hart. In other words, the merits of Morgan's claims against Hart rest upon Hart's violation of the terms of the contract of December 23, 1905, and are wholly unaffected by this alleged fraudulent settlement; though such settlement might or might not be set aside on account of such fraud. The judgment in the former action is, as we view it, an adjudication on the merits of the claims of all the parties of the second part to the contract, to wit, Hackett, Morgan and Shields, as against Hart. We are to remember that this is not an action or proceeding to set aside the judgment rendered in that action.

Counsel for Morgan also contends that the judgment of dismissal with prejudice, rendered in the former action, is not sufficiently certain as to the respective rights there adjudicated to render the same conclusive upon Morgan as to the issues here presented. We think, however, that that judgment did determine that Hart was not accountable to either of the parties of the second part to the contract of December 23, 1905, to wit, Morgan, Hackett or Shields. That judgment manifestly could not have been rendered

with prejudice, that is upon the merits, in favor of Hart in that action upon any other theory.

Some contention is made by counsel for Morgan rested upon the fact that he did not file any answer or cross-complaint in the former action. We think, however, in view of the nature of that action and the relief there sought, the mere fact of his failure to file a formal answer or cross-complaint therein does not change the force and effect of that judgment. It is plain from the record before us that he was informed of the allegations of the complaint in that action and that he consented to the rendering of a judgment with prejudice upon the issues tendered by that complaint. The decisions above noticed, we think, answer this contention. Our decisions in *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427, and *Hawkins v. Reber*, 81 Wash. 79, 142 Pac. 432, are in harmony with this conclusion. In the *Schmidt* case, Justice Gose, speaking for the court, quoted with approval from *Martin v. Evans*, 85 Md. 8, 36 Atl. 258, 60 Am. St. 292, 36 L. R. A. 218, as follows:

"Whenever a decree dismissing a bill in equity fails to restrict its own scope, the presumption, according to the great preponderance of decided cases, is that the issues raised by the proceedings have been disposed of on the merits, and they, therefore, become *res adjudicata*."

We conclude that the judgment rendered in the former action "with prejudice," has all the force and effect of a final judgment against Morgan, upon the issues tendered by the complaint therein.

We conclude that the judgment must be affirmed. It is so ordered.

MORRIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

[No. 12452. *En Banc.* March 22, 1915.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.[1]

TAXATION—RAILROADS—VALUATION OF PROPERTY—INTANGIBLE ELEMENTS. The intangible value inhering to railroad operating property, arising from density of traffic and volume of business along the line, the nature of the country through which the line runs, the facilities for transacting railroad business owned and operated by private individuals, the price of its fuel supply, the resources of the country adjacent to the line, and the density of the population living contiguous thereto, is not the same as the personal element of "good-will" which attaches to business concerns counducted by private parties, but these elements add to the value of the property the same as locality may give enhanced value to real estate.

TAXATION—RAILROADS—VALUATION — ELEMENTS — INTANGIBLE INTERESTS—ASSESSMENTS—UNIFORMITY—STATUTES. Under Rem. & Bal. Code, §§ 9141 and 9148, providing that the state board of tax commissioners, in valuing, for the purposes of assessment, all the operating and other real and personal property of a railroad company, shall consider the value of the entire system and of the part within the state, together with such facts as will enable a substantially correct determination of its assessment value to be had, subject to revision by the state board of equalization, and under 3 Id., § 8626-92, providing that, when the public service commission shall have valued the property of any company, nothing less than the market value as found shall be taken as the true value of property used for public convenience for the purposes of taxation, the assessing officers, after determining the cost of reproduction of a railroad's property to be $109,267,908, and the actual cash market value to be $98,016,646, may further take into consideration the density of traffic and volume of business along the company's lines in this state, the nature of the country through which it runs, its facilities for transacting railroad business owned and operated by private individuals, such as warehouses and docks, the price at which it purchases its fuel supply by reason of the location of coal mines, and the resources and development and population of the adjacent country, and having determined the value of such elements to be $12,291,805, may add the same to the previously found valuation; and such action is not unauthorized or discriminatory as an assessment of the company's "good-will," not assessed against other concerns, nor would it be the application of an unlawful measure of value by a different standard than that

[1]Reported in 147 Pac. 45.

applied by the county assessors to the property of other concerns; since it includes, rather, that intangible element which enters into and enhances the value of real property by reason of its location, its peculiar adaptability to particular uses, inseparable from the physical property itself, and constituting a substantial portion of the value of the operating property and of the road as a whole.

TAXATION—ASSESSMENT—METHOD—CHANGE IN LAW. Where all the valuations for the assessment of property for the current year were completed in May, on the standard of the "market value" of the property, a change of the law going into effect in June, requiring property to be assessed on the basis of one-half of its value, does not affect the assessment for the current year, or authorize the board of equalization, at its sessions subsequent to the going into effect of the new law, to deviate from the standard of valuation in effect at the time the assessments were made.

TAXATION—CONSTITUTIONAL PROVISIONS—EQUALITY AND UNIFORMITY—DUE PROCESS. The assessment of railroad property as an organized entity, including certain elements of intangible value inhering therein, while the general mass of business property has been assessed on the basis of the value of each parcel of real and item of personal property separately considered, is not a violation of the rule of uniformity required by art. 7 of the state constitution; nor is it in violation of art. 14 of amendments to the Federal constitution as to due process and equal protection of the laws.

SAME. The assessment of railway operating property as a unit by the state board of tax commissioners instead of by the county assessors as other property is assessed under the general revenue laws, does not violate art. 7, § 3, of the state constitution that taxes on corporation property shall be assessed and levied as near as may be by the same methods employed for individual property, so long as corporate property is charged the same rate of levy and its assessed value measured by the same standard as other property within the state.

TAXATION—ASSESSMENT—EXCESSIVE VALUATION. In the absence of a showing of actual fraud on the part of the taxing officers, courts ought not to interfere with an assessment charged as being excessive, where the difference between the assessed value and the alleged actual value is less than ten per cent.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 10, 1914, dismissing an action to recover taxes paid under protest, upon sustaining a demurrer to the complaint. Affirmed.

Geo. T. Reid, J. W. Quick, and *L. B. daPonte*, for appellant.

The Attorney General and *Edward W. Allen, Assistant*, for respondents.

PARKER, J.—This action was commenced in the superior court for Thurston county by the Northern Pacific Railway Company against the state of Washington and the counties through which the company's lines of railway are maintained, seeking to compel the acceptance by the several county treasurers, in full payment of the general tax payable by the railway company for the year 1913, sums computed upon a less valuation of its property than that which was assessed by the state board of tax commissioners and equalized by the state board of equalization as the value of such property for purposes of taxation for that year. Before final disposition of the case in the superior court, the railway company, to avoid the accumulation of interest and penalties, paid to the several county treasurers the full amounts claimed by the defendants to be due, which payments were made under protest. These facts, occurring after the filing of the original complaint, were pleaded by supplemental complaint, which concluded with a prayer for money judgments for the amounts of excess thus so claimed to have been paid by the railway company. This prayer was in lieu of the equitable relief prayed for in the original complaint. The defendants demurred to the complaint upon the ground that the facts therein stated are not sufficient to constitute a cause of action. The superior court sustained the demurrer, and the railway company electing to stand upon its complaint and not plead further, judgment of dismissal was accordingly entered against it. From this disposition of the cause, the railway company has appealed to this court.

Before proceeding to analyze the facts as stated in the complaint, the sufficiency of which to entitle the appellant to relief is the problem here for solution, we may state that ap-

pellant's contention, stated generally, is that the assessing of its property by the state board of tax commissioners, and equalization thereof by the state board of equalization, in the year 1913, was excessive in amount to the extent of $12,291,805 over and above the amount such property should have been valued at for purposes of taxation in that year. This result, it is insisted, was brought about by the erroneous and arbitrary action of these boards, amounting, at least, to a constructive fraud upon appellant's rights in the premises. As we proceed, we think it will be made apparent that neither of these boards, nor any of the members thereof, are charged with any acts that can properly be characterized as willfully fraudulent. The material facts, as found in the complaint, and others which we take judicial notice of in connection therewith, may be summarized as follows:

Prior to December 31, 1908, the state railroad commission commenced a proceeding against appellant under the then railroad commission law for the purpose of ascertaining the total market value of the lines, equipment and property of appellant used for public convenience within the state, commonly called operating property. Having, on December 31, 1908, completed its investigation in that behalf, in which we must presume that appellant was awarded full and fair hearing, as provided by that law, the railroad commission made and signed detailed findings of fact wherein it found, among other things, in substance, as follows:

That it would cost to reproduce the lines of railway belonging to appellant, considering the improvements and structures as new..... $61,680,340.75

That it would cost to reproduce the equipment owned and used by appellant..... 14,724,695.94

That it would cost to reproduce the right of way and terminals owned and used by appellant $2,862,872.00

Such total reproduction cost aggregating..$109,267,908.69
That the lines of railway owned by appellant, considering their depreciation by wear and tear, are of the value of $55,475,827.25
That the equipment owned by appellant, considering its depreciation by wear and tear, is of the value of..... 9,677,946.87
That the real property, consisting of right of way and terminals, owned and used by appellant for railway purposes, is of the value of.... $2,862,872.00
The total value as so found, aggregating...$98,016,646.12

The complaint continues as follows:

"Having so determined the then actual cash market value of the said railway system and equipment belonging to plaintiff in this state to be the sum of $98,016,646.12, as aforesaid, the said railroad commission, in said proceeding, further found, ascertained and determined the density of traffic and the volume of business along the line of plaintiff's said railway in the state of Washington, the nature of the country through which the line ran, the facilities for transacting railroad business owned and operated by private individuals, such as warehouses and docks; the price at which plaintiff purchased its fuel supply, the resources of the country adjacent to its line and the density of population living contiguous thereto, and from such findings, circumstances and considerations, said railroad commission assumed and pretended to ascertain and determine the value of plaintiff's said railway lines, equipment and appurte-

nances as a whole over and above and in addition to the actual cash market value thereof, so found by said commission to be the sum of $98,016,646.12, on account of said facilities and the said other considerations last mentioned, to wit: on account of the facilities for the transaction of business by said railway system in this state and the supposed favorable location, as aforesaid, and the facilities owned by other parties, the cost of fuel, etc., and thereupon . . . found and determined the then value of the said property to be the sum of $110,308,451.12, . . . thereby adding to the value of plaintiff's said railway system, equipment and improvement the sum of $12,291,805.00 over and above the actual cash value of the said properties, and the whole thereof, as theretofore determined by said railroad commission."

Thereafter, on the 12th day of August, 1911, the public service commission of the state, having succeeded to the powers and duties of the railroad commission, upon further investigation, in which we must presume that appellant had a full and fair hearing as provided by the public service commission law, made additional findings supplemental to those made by the railroad commission on December 31, 1908, by which additional findings it was determined that appellant had expended certain sums for new equipment and for additions and betterments amounting in the aggregate to the sum of $16,938,172.06, which was added by the public service commission to the total valuation found by the railroad commission on December 31, 1908, so that the total value of appellant's operating property within the state was found by the public service commission to be $127,246,626 on August 12, 1911.

We note here that the complaint contains no allegation that these findings of "total market value of the line, equipment and property of . . . (appellant) . . . used for the public convenience within the state," using the language of the former railroad commission law and the present public service commission law as to the ultimate findings to be made by the commission, have been appealed from, as

provided by law, or that they were not at all times herein involved, in full force and effect and conclusive as of the time of their making, as expressly provided by the railroad and public service commission laws.

Appellant's net annual earnings have decreased from approximately $7,000,000 in 1907 to approximately $4,000,000 in 1912, the years immediately preceding those in which the railroad commission's findings of value were made and in which this assessment and equalization was made. This fact is set out in the complaint evidently as tending to show a decrease in the value of appellant's property between the time of making the findings by the railroad and public service commissions and the assessing of appellant's property for the year 1913.

The complaint continues as follows:

"In the month of May, 1913, the tax commission of the state of Washington adopted said valuation by said public service commission, less the value of certain property not yet put into operation and therefore subject to local assessment, and ascertained and determined the value of plaintiff's said railway system, equipment and appurtenances in the state of Washington by arbitrarily adding the sum of said expenditures (less said property not yet in operation) and found the same to be $126,165,337; and pursuant to the provision of statute certified said valuation so found and determined to the state board of equalization. In the month of April, 1913, plaintiff duly appeared before the said board of tax commissioners, at a hearing fixed by said board for that purpose, and offered evidence to said board tending to show and showing the facts hereinbefore set forth concerning the erroneous and wrongful inclusion in the said valuation by the railroad commission of plaintiff's property of said item of $12,291,805 in addition to the actual cash value of said property; and the plaintiff duly objected and protested against the inclusion of said amount in the valuation of the said property for the purpose of taxation by said board of tax commissioners; but said board of tax commissioners wholly overruled and rejected the said objections and protest of the plaintiff, and, notwithstanding the same,

and contrary to the undisputed evidence adduced before it, wrongfully and erroneously included said item of $12,291,805 in the value of plaintiff's property for taxation."

This action of the board of tax commissioners was, we must assume, taken in pursuance of the law touching its powers and duties as the assessor of the operating property of railway companies, Laws of 1907, page 132; Rem. & Bal. Code, § 9141 and following; and also in pursuance of the mandatory provisions of the public service commission law of 1911, relating to the valuation of operating railway property by the public service commission and the controlling effect of such valuation for purposes of taxation, Laws of 1911, pages 601, 604, § 92 (3 Rem. & Bal. Code, § 8626-92), which was in force at the time of the making of the assessment of appellant's operating property by the board of tax commissioners in May, 1913, hereinafter quoted.

The complaint continues as follows:

"Thereafter, in the month of September, 1913, the board of equalization of the state of Washington duly convened pursuant to the provisions of the statute creating said board and defining and prescribing its powers and duties, and the plaintiff duly appeared before said board at a hearing fixed by it for that purpose, and adduced before the said board evidence tending to show and showing all of the facts hereinbefore set forth, and in due form requested the said board of equalization to deduct from the said valuation of the plaintiff's property the said item of $12,291,805 so erroneously and wrongfully included therein, and certified to the said board by the said tax commissioners, and to eliminate said sum and amount from the valuation of plaintiff's said property for the purposes of assessment and taxation in the defendant counties for the year 1913, and objected and protested against the inclusion by said board of equalization of the said item of $12,291,805 in the valuation of plaintiff's property for taxation in said year.

"The board of equalization wholly ignored the evidence tendered by the plaintiff with respect to said matters and wholly rejected and overruled the protest of plaintiff, and contrary to the undisputed proof, and contrary to the laws

and constitution of the state of Washington and the constitution of the United States, arbitrarily and wrongfully, and wholly without inquiry or the exercise of their own independent judgment, fixed and determined the value of plaintiff's said property in this state for the purposes of assessment and taxation for the year 1913 by arbitrarily adopting the said findings of value so made by the said railroad commission on the 31st day of December, 1908, supplemented by the findings of said commission in the same proceeding on the 12th day of August, 1911, in the said sum of $126,165,337; and after determining the ratio at which property was generally assessed in the various counties of the state, including the defendant counties, did, in the form and manner prescribed by law, certify to the assessors of each of said defendant counties the respective proportion of the total value of said property that the mileage therein bears to the total mileage in the state, as is hereinafter more particularly set forth and alleged, and said valuation was equalized in the defendant counties at the same per cent of true value as adopted for other property in the county, . . .

"The effect and result of the inclusion of said item of $12,291,805 and addition thereof to the valuation of plaintiff's property for 1913 is the assessment of said property to include the supposed value of 'good-will' of plaintiff's business, over and above value of its property, and over and above each and every element and item of value pertaining thereto and valuation of said property by $12,291,805 over and above cost of reproduction thereof, as so found and determined by said railroad commission, is valuation and assessment for taxation of a mere incident of property, in no sense property subject to taxation within the meaning of the constitution and laws of the state of Washington. . . .

"Valuation of plaintiff's said property in a sum more than twelve million dollars in excess of its true and fair physical value was a purely arbitrary valuation, depending upon no known definite or ascertainable criteria, wholly incapable of verification or admeasurement, a mere caprice of the taxing authorities, adopted blindly and without inquiry or the exercise of judgment, and added to the true and fair value of plaintiff's property for the sole purpose of assessment and taxation, thus swelling the taxation value of said property far beyond the valuation on which plaintiff can or is per-

mitted by the public service commission of this state to earn a reasonable or any return. . . .

"There are and were in the year 1913 in this state many and various kinds and classes of property, including hotels, theatres and places of public amusement, restaurants and places of public entertainment, wholesale and retail mercantile establishments and manufacturing plants, and many other properties comprising and including all kinds of business properties and institutions engaged in business as going concerns, to which there does and did in the year 1913, and at all other times appertain large values on account of facilities for the transaction of their respective businesses, and to which there did and does appertain large values on account of 'good-will' belonging thereto, so that said business properties were, as going concerns, worth many millions of dollars more than the fair physical value of the tangible real and personal property involved therein; and the same were of the true and fair market value as going concerns, including good-will or commercial value, of many millions of dollars over and above the cost of reproduction or replacement thereof; and the said business institutions and properties were as susceptible and capable of valuation and assessment for taxation in the year 1913 and at all times, with respect to such intangible values, as was the property of plaintiff. But in no county of the state were any of said business institutions or the property devoted thereto, whether corporations or individuals, assessed for taxation upon a basis including aggregation or going concern value. In every instance all of said other properties were assessed in detail upon the basis only of fair value of the several parcels and items of real and personal property composing the same. The various assessors and taxing authorities in valuing said business properties for taxation for 1913, and at all other times, have in no instance ever considered the value thereof as going concerns, or assessed or added to the value of the physical property anything for 'good-will' or commercial value, or otherwise; and have never considered the earnings of said properties or their value as a whole over and above the value of the several parcels and items of real and personal property composing the same; nor has any assessor ever pretended to assess any property in this state above the cost of reproduction or replacement thereof, nor for even as much

as such cost of reproduction or replacement, without making liberal allowances for depreciation; nor have the taxing authorities of the state in any other way or by any other means assessed general business property in the state in a manner or upon a basis to produce values analogous or similar to the values given plaintiff's said property in the year 1913 as aforesaid. Had plaintiff's said property been valued by the same method and upon the same basis as the general property in the state, it would have been valued at no more than said sum of $98,016,645 (plus said additional property) so found by said railroad commission to be the true and fair value thereof, and the said sum of $12,291,805 would not have been added thereto. All of which was well known to the said taxing authorities of the state of Washington at all times, and especially well known to said state board of tax commissioners; yet said board never has made any attempt to secure assessment and valuation for taxation of said general property in the state by any similar method or on any similar principle, although vested by law with full power and authority over local assessors and taxing authorities in the premises. The said board of tax commissioners and the assessors and other taxing officials have uniformly construed and applied the revenue laws of the state as not contemplating assessment for taxes on the basis of aggregations or going concern value, or the valuation of 'good-will' with respect to property generally, except railways. But the tax authorities have construed and applied the laws of the state with the intent and effect unjustly and illegally to discriminate against plaintiff in the valuation of its property for taxation."

The complaint contains further allegations showing the apportioning of this assessed and equalized value of appellant's operating property to the several counties; and the tender of payment of taxes by appellant to the several county treasurers, computed upon a valuation of its operating property in a sum equal to the assessment less the $12,291,805 alleged by appellant as excessive. The supplemental complaint also alleges facts showing payment under protest to the several county treasurers of the full amount of taxes claimed by the respondents to be due. No question is raised

touching the sufficiency of the allegations of tender and payment under protest, to entitle appellant to relief, providing it has alleged sufficient other facts entitling it to relief.

This statement of the somewhat involved facts, as counsel for appellant apparently view them, may seem unduly lengthy. However, we proceed at such length and in detail to the end that no really material fact disclosed by the complaint, and other facts relative thereto within our judicial knowledge, be lost sight of.

In the allegations of the complaint reference is made by number to the published findings of the railroad commission of December 31, 1908, touching the affairs of and the value of the property of appellant, though no copy of such findings is attached to the complaint nor physically made a part thereof. However, counsel for appellant asks that we take notice of all of these findings in so far as they are applicable to this controversy. This request seems to be rested upon the ground that we should take judicial notice of such findings without their being pleaded. However, counsel has filed in this cause a copy of these findings, and we will take notice of them, assuming for argument's sake that they are a part of the complaint. We express no opinion upon the question of our right to take judicial notice of them regardless of their being pleaded. These and possibly some other facts will be noticed as may become necessary in our discussion of the several contentions of counsel.

Counsel for appellant state the first of their principal contentions as follows:

"The valuation of appellant's operating property by including the value of the 'good-will' or its supposed value as a whole and as a going concern at a sum $12,291,805 in excess of the full and fair value of each and every parcel of real and article of personal property used in the operation of appellant's railway system, and in excess of the cost of reproduction thereof, is not warranted by the constitution and revenue laws of this state."

To the end that we may not be led astray by the words "good-will," which counsel for appellant have here and in the complaint used as descriptive of that intangible value attaching to appellant's operating property, which the railroad commission regarded as adding $12,291,805 to the value of the physical components of such property viewed separate and apart from the assembling of such components into an organized whole with the attendant advantages and privileges resulting therefrom, let us see what this so-called "good-will" is, in fact and substance. Is it that intangible something which is so intimately connected with the personal element entering into the conduct of a private business concern having no duties relating to the public other than those of private persons and no privileges or advantages save such as all private persons may acquire, which intangible something adds in some degree to the value of such business because it materially influences its earning power? Is it not rather more akin to that intangible element which enters into the value of real property by reason of its locality, its peculiar adaptability to some particular use wherein there enters no personal element whatever, but only that intangible something influencing the value of such property which is inseparable from the physical property itself regardless of its ownership? If this element of intangible value found by the railroad commission to constitute a substantial portion of the value of appellant's operating property is more of the nature suggested by the latter than the former question, we apprehend that it is not in substance mere "good will" within the commonly accepted meaning of those words as applied to the business of a going private concern.

Recurring to the allegations of the complaint first above quoted, we are informed that the elements considered by the railroad commission in determining the amount of this intangible added value of appellant's operating property are:

(1) "Density of traffic and volume of business along the line of plaintiff's said railway in the state of Washington."

(2) "The nature of the country through which the line runs."

(3) "The facilities for transacting railroad business owned and operated by private individuals, such as warehouses and docks."

(4) "The price at which plaintiff purchases its fuel supply."

(5) "The resources of the country adjacent to its line and the density of the population living contiguous thereto."

Now in considering these elements as adding value to appellant's operating property in connection with the question of whether such value resulting therefrom is nothing more substantial than "good will" value, let us keep in mind as we proceed that appellant is not a private business concern but is a public service transportation corporation; that appellant's operating property is all devoted to the public service of transportation over lines and terminals having a fixed location; that not only are appellant's lines and terminals as fixed and permanent in location as other real property, but its operating personal property is also in a sense equally fixed in location and use, in that it must be used in connection with and upon such lines and terminals; that appellant cannot abandon its duty to serve the public, nor can it dispose of its property real or personal in such manner as to result in discontinuance of such service; that appellant and its successors in ownership of such property are bound to maintain such service, and incidentally to maintain an organized entity necessarily consisting of equipment and operating property, both real and personal, as a unit organization such as will make the rendering of such service possible. Having in mind this entity, all parts of the physical property of which, both real and personal, is, so to speak, dedicated by law to the particular public service to be rendered upon appellant's fixed lines and terminals and not elsewhere,

what is there about these intangible elements considered by the railroad commission as adding value to the whole materially different in substance from those intangible elements which enter into the value of real property.

The density of traffic and the volume of business along the line of appellant's railway add value to its operating property just as the density of traffic and volume of business add value to the real property, regardless of its ownership. The nature of the country through which appellant's lines run influences the value of its operating property in the same manner, regardless of the ownership of such property. The facilities for transacting railroad business owned and operated by private individuals and others, such as warehouses and docks adjacent to appellant's railway lines, add value to appellant's operating property for substantially the same reasons, and this would be true regardless of the ownership of such property. The resources of the country adjacent to appellant's line and the density of population living contiguous thereto add value to its operating property in the same manner. The price at which appellant purchases its fuel supply, taking the allegation of the complaint alone, relative thereto, may not seem to add intangible value to appellant's operating property of this same nature; but turning to the findings of the railroad commission, which for argument's sake we are treating as properly pleaded, we are informed that appellant, by virtue of its ownership of the capital stock of a subsidiary corporation, controls valuable and extensive coal mines which are located in close proximity to its main line of railway and which are also located near the summit of the Cascade mountains, thereby enabling the appellant to distribute coal therefrom for the most part by down grade haul along its railway for consumption by its locomotives and,

"That, by reason of the proximity of the said coal lands to the said line of railroad and by reason of the said road owning and controlling said mines, it adds great value to the

lines of the said road within the state of Washington, in that it enables said road to lay down its fuel at the different distributing points along its line, used and consumed by it in the operation of its trains, at greatly reduced cost over other lines operating in the state of Washington."

Aside from the ownership and control of these mines by appellant, it is manifest that their presence alone in such proximity to appellant's main line of railway adds value to the entity constituted by its operating property, of a nature akin to that which favorable location adds to the value of real property, and such would be presumably true regardless of the ownership of the mines, and regardless of the ownership of appellant's operating property; assuming, of course, as we must, that such operating property is to remain intact as an organized entity. The ownership of these mines by appellant, however, is an element which we concede is of a somewhat different nature, which we will notice later.

Another intangible element considered by the railroad commission as adding value to appellant's operating property not specifically mentioned in its complaint but complained of by counsel as being so-called "good will," appears in the railroad commission's findings as follows:

"That since the construction of the line of the Northern Pacific Railway Company through the state of Washington, said company has expended large sums of money advertising and exploiting the resources of the country adjacent to its lines and has encouraged immigration along its lines so that the country adjacent and tributary to its rail lines has a comparatively large population and the density of traffic and the country tributary to its lines are comparatively highly developed, compared with other portions of the state of Washington, which density of traffic and population add value to the said lines."

This, in its final analysis, is but a finding touching the extent of the development of the country tributary to appellant's railway lines. It manifestly is not the effort of appellant to populate and develop such tributary country that

constitutes the intangible value considered by the railroad commission, but it is the fact that such tributary country is populated and developed. This intangible element of value of appellant's operating property exists without reference to the manner of its bringing about and is in substance of the same nature as the resources of the country adjacent to appellant's railway lines above noticed.

Another finding of the railroad commission complained of by counsel for appellant, though not specifically mentioned in the complaint, appears in the commission's findings as follows:

"That in addition to the properties hereinbefore set out as being owned by the Northern Pacific Railway Company, said company is the owner of the right to select Government land in lieu of lands relinquished by it to the United States included within its land grant in the state of Washington, amounting to 631,252.88 acres, which right the commission estimates to be of the reasonable value of $8 per acre."

Counsel seem to argue that this was regarded by the railroad commission as adding an element of intangible value to appellant's operating property. This finding does not so indicate, and we think the findings as a whole negative the idea that this right of appellant was considered by the railroad commission as adding value to appellant's operating property.

These are the only intangible elements claimed by counsel for appellant to have been regarded by the railroad commission as adding value to appellant's operating property to which our attention has been directed in such manner as to call for our special notice. Aside from the consideration by the railroad commission of the control of the coal mines by the appellant as adding to the intangible value of its operating property, we see nothing in the intangible elements of value actually regarded by the railroad commission as adding such value of a substantially different nature from those intangible elements which enter into and inhere in the value

of real property, regardless of its ownership; and we are of the opinion that the element of appellant's control of the coal mines, as found by the railroad commission, is of too small consequence to render the nature of the intangible elements entering into the value of appellant's operating property materially different from that which enters into the value of real property. This we think is the real nature of this intangible added value. It is, as we view it, something quite different from mere "good-will."

Appellant does not allege, as we read its complaint, nor does its counsel seriously contend, as we read their briefs, that its operating property within the state in the year 1913, viewed as a unit, was not then in fact of the total market value of $126,165,337, as determined by the state boards of tax commissioners and equalization; but the contention is, in substance, that such total valuation was determined by a method which included an element of intangible value of the same nature as that which attaches to a large quantity of other property within the state, which element of intangible value was not included in the valuation of other property by the county assessors in determining the value of such property for taxation in that year. Now let us again recur to the allegations of the complaint and see what this other property claimed by counsel to have been assessed without the inclusion of this intangible element of value is. In the beginning of the last above quoted paragraph of the complaint we are informed that:

"There are and were in the year 1913 in this state many and various kinds and classes of property, including hotels, theatres and places of public amusement, restaurants and places of public entertainment, wholesale and retail mercantile establishments and manufacturing plants, and many other properties comprising and including all kinds of business properties and institutions engaged in business as going concerns, to which there does and did in the year 1913, and at all other times, appertain large values on account of facilities for the transaction of their respective businesses,

and to which there did and does appertain large values on account of 'Good-will' belonging thereto, so that said business properties were, as going concerns, worth many millions of dollars more than the fair physical value of the tangible real and personal property involved therein;"

These are the properties claimed to have been valued for taxation without the inclusion of this so-called "good-will" value attaching thereto. We are unable to read this statement of what such property consists of, so as to include therein operating property of any other railway company, nor does the language point with any degree of certainty to the operating property of any other public service corporation. We think this allegation means nothing more than that the "good-will" value of private business concerns was not added to the value of their physical property in determining its value for taxation by the county assessors in the year 1913. We understand counsel for appellant to contend that it would not have been lawful for the county assessors to have added "good-will" value, to the value of the physical property of such concerns for the purpose of taxation. Indeed, their whole argument seems to be rested upon the theory that such "good-will" value is not taxable as property at all. In support of this theory, they cite, among other portions of our revenue laws relating to the duties of county assessors, the following:

"He shall actually determine as nearly as practicable the true and fair value of each tract or lot of real property." Rem. & Bal. Code, § 9102 (P. C. 501 § 121).

"He shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time the assessment is made." Id., § 9112 (P. C. 501 § 113).

These provisions of the statute with others, it is insisted, evidence a legislative intent to have each lot, tract, article and piece of property, whether real or personal, valued by the county assessors for taxation by itself; which precludes

the idea of the intangible element of "good-will" entering into such valuation. We shall so assume for the purposes of this controversy.

The county assessors are not, however, the assessors of railway operating property; that duty being committed by law to the state board of tax commissioners. The statute so providing, we think renders it plain that the assessed valuation is to be placed upon the entire operating property of each railway company as a unit. Sections 9141 and 9148, Rem. & Bal. Code, provide, among other things, as follows:

"The state board of tax commissioners shall make an annual assessment of the operating property of all railroad companies within this state, for the purpose of levying and collecting taxes as hereinafter provided."

"The board shall prepare assessment-rolls and place thereon, after the name of each railroad company assessed, the general description of the property of such railroad, which shall include its real estate, right of way, tracks, stations, terminals, appurtenances, rolling stock, equipment, franchises and all other real and personal property of said company, which shall be deemed and held to include the entire property and franchises of such railroad company within the state, and all title and interest therein. . . . In case of railroad companies which own or operate railroads lying partly within and partly without the state, the said board shall only value and assess the property within this state. In determining the value of the portion within the state, the board shall take into consideration the value of the entire system, the mileage of the whole system, and of the part within this state, together with such other information, facts and circumstances as will enable the board to make a substantially just and correct determination. When the value of the property of the railroad company within this state shall have been ascertained and determined, the amount thereof shall be entered upon said assessment-rolls, opposite the name of the company, and shall be and constitute the value of the entire property of such railroad company within this state, for the levy of taxes thereon, subject to revision and correction by the state board of equalization as hereinafter provided."

This language of the latter section manifestly refers to operating property, or as termed in the railroad and public service commission laws, "property used for the public convenience," and is the same class of property which it was the duty of the railroad commission in 1908 to determine the "total market value of," which duty later devolved upon the public service commission. This, we think, is rendered plain by a reading of § 9148, above quoted, in connection with the provisions of the railroad commission law, especially as amended by the public service commission law of 1911 touching the duty of the commission and the effect of its finding of value of such property; the Laws of 1911, § 92, at page 604, reading:

"When the commission shall have valued the property of any public service company, as provided for in this section, nothing less than the market value so found by the commission shall be taken as the true value of the property of such company used for the public convenience for the purposes of assessment and taxation." 3 Rem. & Bal. Code, § 8626-92.

In *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7, and *Spokane & I. E. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688, we held, in effect, that the property to be assessed by the state board of tax commissioners and the property to be valued by the railroad and public service commissions is the same property. We are prompted to make this observation so that it may be rendered plain that the organized entity consisting of appellant's operating property, so valued for purposes of taxation, did not include any property other than the property of appellant "used for the public convenience," and that whatever other property may have been owned by appellant in that year was not valued for taxation by the state board of tax commissioners, but by the county assessors, and was not regarded as entering into or forming part of appellant's operating property.

This court has recognized, in harmony with what seems to be the well settled law as established by the decisions of the courts generally, that the valuation of the operating property of a railway company for purposes of taxation by the state board of tax commissioners as an entirety and the apportioning of such valuation to the several counties through which the line of such railway company runs, notwithstanding certain provisions of our constitution which we will presently notice, is a lawful method of valuing such property for purposes of taxation. *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478, 93 Pac. 924; *Great Northern R. Co. v. Snohomish County*, 54 Wash. 23, 102 Pac. 881; *State ex rel. Morton v. Back*, 72 Neb. 402, 100 N. W. 952, 69 L. R. A. 447; *Wells, Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; *State v. Western Union Tel. Co.*, 96 Minn. 13, 104 N. W. 567; *Chicago & N. W. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557; *State Railroad Tax Cases*, 92 U. S. 575; *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585.

The last cited case is particularly applicable here, because it was there held that a state may tax that portion of the operating property of an interstate railway lying within the state as an organic portion of the whole. However, counsel do not contend against the effect of the unit rule of assessment except in so far as such rule has, as they claim, been applied by the state board of tax commissioners so as to make a part of the total valuation of appellant's operating property the intangible elements of value amounting to $12,291,805.

There has not come to our notice any decisions of the courts dealing directly with the exact problem thus presented. Some pertinent observations, however, have been made by the courts of Michigan and Wisconsin which are in harmony with our view already indicated that this intangible value is something different from "good will" value. In *Detroit Citizens' St. R. Co. v. Common Council of Detroit*, 125

Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. 589, involving the taxation of the company's franchise in connection with, or rather as an intangible element of, value attaching to its physical property, Justice Hooker, speaking for the court, said:

"When, however, they [franchises] are associated with property which makes them available, the property with which they are connected generally takes on a new form in the law, and is enhanced by the privileges and uses to which it is adapted and applied, and pays a correspondingly increased tax, because it has an increased cash value. . . .

"The relator contends that the personal property should be assessed upon the basis of the component parts of the railway system, *i. e.*, a given price per mile for track and overhead construction, an average sum per car, and a certain sum for machinery, all bearing some relation to their cost or the price at which similar articles can be obtained. In fact, the relator claimed upon the hearing below that the tangible property was so valued, and that some $2,000,000 or more was then added for the value of the franchise. The court set the matter at rest, however, by finding that, in fixing the value of the personal property, the assessors took into consideration and included the franchise in the streets. . . . The individuality of the elements of the road as chattels, *i. e.*, spikes, rails, ties, poles, wire, etc., has become lost, as in other cases of fixtures, by being transformed into other property, the value of which is to be determined by relation to that kind of property, and not to spikes, ties, rails, etc., just as fine furniture is valued by comparison with similar articles, and not with similar materials to those entering into its construction.

"It is obvious that the relator's property is worth much more as a street railway, equipped and in successful operation, than the elements which enter into its construction would be as second-hand railway material. It may be worth much more than what it would cost to reproduce the physical aggregation of property constituting such railway and its equipment, and circumstances might exist which would make it worth less. The propriety of treating aggregations of property as a unit is as natural and proper for the purposes of assessment as for sale, and this is especially so where the

various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted.

"We may take judicial notice that the relator's street railway has a large market value, much in excess of any amount that could be obtained for the same if it were to be dismantled, and its rails, cars, motors, wires, etc., sold separately. In such a case it would practically go as junk. Again, the easement of a steam railroad in a continuous right of way through the state, over a desirable route, and in use, has a much greater value than the same kind of a right not in use, or in small, disconnected parcels, or in a remote region, where it cannot be used profitably. Manufacturing establishments and large buildings, favorably located and adapted to special uses, illustrate the same principle, and we think it is incorrect to say that the recognition of this principle, and its consideration in assessment, is taxing the good will of a business, which, like executory contracts, has not, usually, been thought to be taxable."

In *Washburn v. Washburn Waterworks Co.*, 120 Wis. 575, 98 N. W. 539, Justice Marshall, speaking for the court touching the element of intangible value entering into the operating property of a public service corporation having reference more particularly, however, to its franchise, after citing decisions, observed:

"An examination of those and other cases decided here, that might be referred to, shows that it has been as firmly established as anything can be by judicial determinations, that all the property of a public service corporation, such as appellant, street and other railway companies, and public lighting companies, whether real, personal or mixed, in the ordinary sense of those terms, including franchises other than the mere right to be a corporation, is one entire indivisible thing; that all the parts partake of the nature of the franchise from which springs the public duty, and as that is deemed to be personalty, all should be regarded as such. In that view it would be the height of absurdity to consider value and impose a tax upon one part of such entire thing separate from the rest. There can be no separation

without destruction. Therefore the separate value of the parts in the aggregate would not necessarily approximate to or be any legitimate measure of the value of all the parts, viewed as one complete machine, so to speak. The franchise by itself would be valueless. The plant in its parts as realty and personalty according to the character thereof, irrespective of the combination of all into one entire thing, might be of little value, and probably would be, as compared to what they would represent in the new form, produced by the union of many parts into one. The great value is produced by the combination of parts into one complete working machine, adapted in a high degree to the service of man. One might as well endeavor to value one part of any mechanical device by itself as to so value the franchise of a public service corporation by itself, or so value its land, or likewise its movables. To do so leaves out of view the great and often chief element of value which is produced by the combination. So in order to deal justly in the distribution of public burdens, the entire property in use and for use in the exercise of the public franchise, for the purposes of taxation, should be regarded as realty, the franchise and movables being viewed as appurtenant to the lands, or the intangible element regarded as personalty, and the physical elements, consisting of lands and movables, be regarded as appurtenant thereto and partaking of its character."

Assuming that the Michigan and Wisconsin courts in these decisions were dealing with no other intangible element of value than that of a franchise, we think, nevertheless, their observations are applicable here, in that such franchise value attaching to the physical property involved in those decisions attaches to the physical property in the same way and is of the same nature as such elements of value considered by the railroad commission and the tax boards in this controversy. The intangible value here involved is no less inseparable from the value of the physical property.

We are of the opinion that this intangible value, considered by the railroad commission, the state board of tax commissioners and the state board of equalization as entering into and enhancing the value of appellant's operating prop-

erty, was not the application of an unlawful measure of value of such property for purposes of taxation, nor was it a measure of the value by a different standard than that applied by the county assessors to the property of the concerns of the nature mentioned in appellant's complaint, notwithstanding the "good will" of such concerns was not considered as an intangible element of value attaching to their property. The element of "good will" value, which it is insisted was omitted by the county assessors from the value of the property of business concerns, attaches to the business rather than to the physical property of the concern; while this intangible element considered by the railroad commission and the state taxing boards as enhancing the value of appellant's operating property attaches to and inheres in such property regardless of its ownership. This, we think, logically results from the fact that such property constitutes an organized entity having a fixed physical location—dedicated by law, in a sense, to public service; and constitutes an entity which neither appellant nor its successors in ownership, whoever they may be, can destroy or impair so as to result in a discontinuance of such public service. This intangible element of value, as already suggested, is much more akin to that intangible something which has so much to do with the value of real property, inseparable therefrom so long as such intangible element exists, regardless of the ownership of such property.

We are reminded by counsel for appellant that the public service commission law was amended in 1913 touching the force and effect of the findings of the public service commission as to the value of appellant's operating property, to read as follows:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or

any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested." (Laws of 1913, p. 665, § 92 [3 Rem. & Bal. Code, § 8626-92]);

which amendment became effective on June 12, 1913, before the equalization of the value of appellant's operating property by the state board of equalization in September of that year. In this connection, we note that, in 1913, before the passage of this amendment, another act was passed amending the general revenue laws of the state, reading in part as follows: "All property shall be assessed at not to exceed fifty per cent of its true and fair value in money." Laws of 1913, p. 438 (3 Rem. & Bal. Code, § 9112); which amendment also became effective on June 12, 1913. This amendment, which changed the statutory measure of values for taxation purposes from the true value as prescribed by Rem. & Bal. Code, § 9112 (P. C. 501 § 113), to "not to exceed fifty per cent" thereof, would seem to have been rendered necessary by the amendment to the public service commission law in this respect, to the end that the uniform rule of taxation prescribed by article 7 of our constitution be not violated. We therefore have a different rule for the valuing of all property within the state for taxation, coming into existence on June 12, 1913.

Counsel argue that the state board of equalization disregarded its duty in giving any consideration to the findings of the railroad and public service commissions of 1908 and 1911 as to the total value of appellant's operating property, because the measure of value applied by those commissions was, in no event, applicable in September, 1913, for purposes of taxation, another rule having been prescribed by statute and become effective on June 12, 1913. But let us also be reminded that the state board of tax commissioners valued appellant's operating property for taxation for the year 1913 and certified the same to the state board of equalization, as the statute required, in May, 1913; and that

the county assessors had made their assessments within their respective counties for that year prior to this statutory change in the measure of value, occurring on June 12, 1913. Rem. & Bal. Code, § 9102 (P. C. 501 § 121). So it is apparent that all of the property of the state had been assessed by the county assessors and the state board of tax commissioners before any change in the law touching the value of property for taxation had become effective. Manifestly then, such assessments were, at the time they were made, strictly legal unless that made by the state board of tax commissioners was excessive for some other reason than because of the inclusion therein of the intangible element of value complained of by appellant. Now, confining ourselves to this particular branch of the controversy—that is, the question of the inclusion of this intangible element of value in the assessment of appellant's operating property, the problem, in its last analysis, is, Was such intangible element of value properly included by the *state board of tax commissioners?* This question manifestly can only be answered in the affirmative in view of the state of the law in May, 1913, when that board assessed appellant's operating property and the county assessors had completed their assessments within the respective counties for the year 1913, all of the assessments of property within the state occurring when the prescribed statutory measure of value of all property for taxation was "market value." Reviewing the law upon this subject, as then existing, in *Spokane & I. E. R. Co. v. Spokane County*, 75 Wash. 72, 87, 134 Pac. 688, we said:

"These provisions, in their last analysis, seem to us to plainly fix the same measure of value, which reduced to its simplest terms, is 'market value.' Neither the revenue laws nor the public service commission law recognize any other standard of value. It follows that these laws, if administered according to their terms, will not result in unequal values being placed upon property of different owners, nor require

such owners to pay taxes other than in proportion to the value of their property, all measured by the same standard."

So it is not a question of the state board of equalization's adopting the findings of the railroad and public service commissions as to the value of appellant's operating property; but it is a question of that board's adoption of the value of appellant's operating property as determined by the state board of tax commissioners, the lawfully constituted assessor thereof. It is an assessment strictly legal when made, in so far as it included the intangible element of value above noticed, unless excessive because of changed conditions. We conclude that the change in the law touching the standard of value of property for taxation purposes did not render the duty of the state and county boards of equalization touching the equalization for the year 1913 different from what such duties would have been, in the absence of this particular change in the law.

Counsel for appellant state the second of their principal contentions as follows:

"The assessment of appellant's operating property on the basis of its supposed value in the aggregate, while assessing the general property of the state on a much more favorable basis, constitutes an illegal discrimination and violates sections 1, 2 and 3 of article 7 of the state constitution, and the 14th amendment to the constitution of the United States."

Our foregoing discussion, we think, leaves little to be said upon this contention, since we have determined that other property within the state was not assessed upon a more favorable basis than was appellant's operating property for the year 1913, in view of the nature of such property as an organized entity. So far as the measure of value of appellant's operating property as compared with the measure of value of other property within the state adopted for taxation purposes is concerned, we rest our conclusion that there has been no violation of the rule of uniformity prescribed by article 7, of our constitution, upon the grounds already

noticed. Upon the same grounds we rest our conclusion that no right guaranteed by the fourteenth amendment to the Federal constitution has been violated.

We are reminded by counsel for appellant of the provisions of § 3, of art. 7, of our state constitution, reading as follows:

"The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property."

The framers of this constitutional provision evidently recognized that it might be desirable, and even more conducive to the rule of uniformity prescribed by other sections of the constitution, that corporate property, by reason of the peculiar nature of much of such property, so far as the intangible elements entering into its value is concerned, be assessed by a method differing in some degree from that employed in the assessing of other property. We are of the opinion that the mere fact that the assessing of appellant's operating property as a unit by the state board of tax commissioners as prescribed by the law relating to assessment of railway operating property, instead of by the county assessors as other property is to be assessed under the general revenue laws, is not violative of this provision of the constitution; so long as such property is charged by the same rate of levy and its assessed value measured by the same standard as other property within the state. There is no question here involved as to the rate of levy; and we think we have already demonstrated that the measure of value applied to appellant's operating property is the same as that applied to other property within the state for the purpose of taxation. Our decisions in *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7, and *Spokane & I. E. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688, are in harmony with this conclusion, though this exact question was not there considered.

In support of their claimed violation of appellant's rights guaranteed by the fourteenth amendment to the Federal constitution, counsel for appellant cite, and apparently rely most strongly upon, the decision of the United States supreme court in *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20. A critical reading of that case, we think, will show that a discrimination of the nature there involved does not exist, as claimed by counsel, in this controversy. The nature of the discrimination there involved is found in the statement of Justice Peckham, at page 36 of the official report, as follows:

"The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the state, through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the state, which the state might do, *Coulter v. Railroad*, 196 U. S. 599, but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations."

It is not claimed that, in the assessing and equalization of the value of appellant's operating property, there was any discrimination made by the taxing officers as between it and other railway corporations. Even should we view the allegations of the complaint as having some reference to property and the intangible value thereof other than the mere good will of private business concerns, it is apparent that the allegations of the complaint do not even, as so

viewed, point with any degree of certainty to any material quantity of such property which had been assessed by the use of a different standard of value than that employed in assessing appellant's operating property; which, in any event, would render the complaint insufficient so far as this branch of the controversy is concerned. *First Nat. Bank of Aberdeen v. Chehalis County*, 6 Wash. 64, 32 Pac. 1051; *Puget Sound Nat. Bank of Seattle v. Seattle*, 9 Wash. 608, 38 Pac. 219.

We think we have shown that the intangible element of value attaching to appellant's operating property and considered by the railroad and public service commissions in determining the total value of such property is something more and quite different from mere "good-will" value attaching to a business of a private concern, and that the measuring of the value of such operating property by the inclusion of this intangible element therein is not a different measure of value than that applied to property of private concerns without regard to the good will value of the business of such concerns; because such good will value does not enter into the value of the physical property of such concerns, nor has the property of such concerns any intangible value of the nature which attaches to appellant's operating property. This, we think, in its last analysis, is the alleged discrimination which counsel insists has resulted from the valuation of property within the state for taxation in the year 1913. It seems plain to us that there has been no violation of any right guaranteed to appellant by either the state or Federal constitutions.

Counsel for appellant state their third and last principal contention as follows:

"The assessment of appellant's property so as to include the item of $12,291,805 in excess of the full cost of reproduction of the property was grossly excessive in the year 1913."

This contention apparently does not mean that appellant's operating property, viewed as a unit, was not in fact of the

total market value of $126,165,337, in the year 1913, as determined by the state board of tax commissioners and the state board of equalization for that year, and as was previously determined by the findings of the railroad and public service commissions in the years 1908 and 1911. We have already noticed that the appellant does not allege unqualifiedly that the total value of its operating property viewed as a unit did not in fact equal that sum in the year 1913. Counsels' whole argument seems to avoid, with marked circumspection, committing themselves to an unqualified contention that appellant's operating property viewed as a unit was not of that total value in the year 1913; but is directed to the question of the total value of appellant's operating property, eliminating its intangible value when viewed as a unit, as compared with the value of other property within the state. Assuming, for argument's sake, that this is not a wholly fair statement of counsels' position upon this, their third principal contention, what facts are alleged in the complaint pointing to a material depreciation in the market value of appellant's operating property such as to warrant a court of equity interfering with the assessment thereof for purposes of taxation by the proper taxing officers of the state? Counsel assert, under their third principal contention, that:

"The assessment is excessive because of the radical change in conditions, resulting in a large decrease in the net earnings of the property, and a consequent permanent impairment of its value."

The only facts alleged or urged in support of this particular contention are the allegations of the complaint touching depreciation in the net earnings of appellant's operating property from approximately seven million dollars in the year 1907 to approximately four million dollars in the year 1912; the latter being the year immediately preceding that in which this assessment was made. We also note that the only specific sum claimed as the amount of such deprecia-

tion is the $12,291,805, mentioned in their complaint and in the preceding portion of their argument, claimed as unlawfully added to the value of appellant's physical operating property as its intangible value when viewed as a unit. We have also noticed that there is no willful fraudulent act charged against either the state board of tax commissioners or the state board of equalization; nor is it charged that either of these boards refused to hear all the evidence that was submitted to them by the appellant when they were considering the value of appellant's operating property. While it is alleged that these boards arbitrarily reached their decisions and refused to exercise their honest judgment, this, we think, amounts to practically nothing more than that they erroneously reached their decisions when the facts left no room for difference of opinion as to what their decisions ought to have been as to the value of appellant's operating property. To sustain this particular contention of counsel, it seems to us would mean nothing more than to say that the valuation of appellant's operating property as a unit in the total sum of $126,165,337, in the year 1913, was excessive and the result of arbitrary and capricious action on the part of these taxing boards, simply because it must be so presumed from the sole fact of this alleged excess of $12,291,805; which in no event would constitute an excess valuation exceeding ten per cent. We think no decision can be found where a court of equity has ever interfered with an assessment upon such a showing as this, in the absence of a showing of actual fraud on the part of the taxing officers. Counsel call our attention to, and rely principally upon, our recent decision in *Spokane & I. E. R. Co. v. Spokane County*, 82 Wash. 24, 143 Pac. 307, to support their position in this particular contention, but in that case the railroad company's operating property viewed as a unit was alleged to be assessed at $12,500,000, when its market value at the time was in fact not in excess of $6,645,000. In other words, the allegations of the complaint in that case showed that the

railroad company's operating property was assessed substantially double its real value. If this could be clearly proven upon trial, together with other circumstances there pleaded, as was held, it would be an excessive assessment, and such as would warrant interference with by a court of equity, and would of itself raise a presumption of constructive fraud. The view there expressed is but in harmony with the previous decisions of this court holding, as stated by Justice Main, in *Simpson Logging Co. v. Chehalis County*, 80 Wash. 245, 141 Pac. 344, that:

"The value of property for the purposes of taxation as equalized or adopted by the board of equalization may be so grossly in excess of the actual value as to constitute constructive fraud. In such a case, the court has jurisdiction to review the assessment in a proper proceeding."

In no case has this court ever interfered with an assessment of property for purposes of taxation upon the sole ground of excessive assessment, in the absence of a showing of actual fraud on the part of the taxing officers, where the difference between the assessed value and the actual value was as small as ten per cent. We conclude that we should not interfere in this case, however strong the proof might be as to the actual value of the property being only ten per cent less than the amount it is valued by the proper assessing authorities—that, necessarily, being a question of opinion, and there being practically no other fact upon which to rest an attribution of fraud to such assessing and equalizing authorities.

Other minor contentions, are, we think, necessarily disposed of by what we have already said.

The judgment is affirmed.

MORRIS, C. J., ELLIS, FULLERTON, MOUNT, MAIN, CROW, and HOLCOMB, JJ., concur.

[No. 11812. Department One. March 23, 1915.]

CARSTENS PACKING COMPANY, *Respondent*, v. EMPIRE STATE SURETY COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTOR'S BONDS—NOTICE OF CLAIM—SUFFICIENCY. A notice of claim against a city contractor's bond, for supplies furnished to the contractor, which mentions three improvement districts in which the contractor gave separate bonds to secure the performance of distinct contracts, pursuant to Rem. & Bal. Code, §§ 1159-1161, is so vague and indefinite as to be insufficient to support a cause of action where it fails to segregate the value of the supplies furnished on account of any district, and does not specify the bond against which the claim is filed.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 26, 1913, in favor of the plaintiff, in an action for supplies sold to a contractor, used in a city improvement. Reversed.

Bausman & Kelleher, for appellant.

Ryan & Desmond, for respondent.

CROW, J.—Action by Carstens Packing Company, a corporation, against L. G. McGuire and F. W. McGuire, copartners, as principals, and Empire State Surety Company, a corporation, as surety, to recover the purchase price of provisions and supplies sold. The McGuire Brothers defaulted. The surety company interposed a demurrer to the complaint, which was overruled. Thereupon it refused to plead further, and it now appeals from a judgment entered against it for the amount claimed.

The action is predicated upon two surety bonds, alleged to have been given in compliance with the requirements of Rem. & Bal. Code, §§ 1159-1161 (P. C. 309 §§ 93, 95, 97), and the only question presented is whether the complaint states a cause of action against the surety company. Re-

[1]Reported in 147 Pac. 36.

spondent, in one cause of action, in substance, alleged that, on September 25, 1911, and on October 23, 1911, the defendants McGuire Brothers, for a valuable consideration, entered into two written contracts with the city of Anacortes, whereby they contracted to grade and improve certain streets in districts known as improvement district 77 and improvement district 80, respectively; that they completed the contracts; that at the time of the execution of the contracts, the defendants McGuire Brothers, as principals, and the appellant Empire State Surety Company, as surety, to secure the city and for the purpose of protecting it against claims for labor, material and supplies furnished to McGuire Brothers, executed and delivered to the city their two certain bonds of indemnity in the sum of $8,432.25 on district 77, and in the sum of $9,300 on district 80, which bonds were severally conditioned that the defendants McGuire Brothers would faithfully perform the provisions of their respective contracts and pay all laborers, mechanics, subcontractors, and materialmen, and all persons furnishing the contractors with provisions and supplies for the carrying on of the work under the contracts; that the grading and improvement under the several contracts was carried on by McGuire Brothers simultaneously; that in their work and operations thereunder, they maintained and conducted a general boarding camp where all their employees and laborers working under the contracts were boarded; that respondent, at the special instance and request of McGuire Brothers, furnished them with meats, provisions, and supplies of the reasonable value of $526.15, for use in the boarding camp, and that the same were used in carrying on said work and in the maintenance and conduct of the boarding camp; that within thirty days after the completion of the work and its acceptance by the city, respondent filed with the city clerk a notice of its claim for the value of the meats, provisions, and supplies so furnished, and that no part thereof has been paid. Copies of the two separate contracts, the two separate bonds, and the

notice of claim filed with the city clerk under Rem. & Bal. Code, § 1161 (P. C. 309 § 97), were attached to the complaint and, by proper allegations, were made a part thereof. Omitting formal parts, the notice which was directed to the city and the appellant surety company reads as follows:

"The Carstens Packing Company, a corporation, holding a claim against McGuire Bros., contractors doing public work in the city of Anacortes, Washington, in Local Improvement Districts Nos. 77, 78 and 80, in the amount of five hundred and twenty-six and 15-100 ($526.15) dollars, for supplies furnished the said McGuire Bros. for the carrying on of the said contract, herewith gives notice of its said claim against the said McGuire Bros., the city of Anacortes, and the bond filed by said McGuire Bros."

It will be noticed that two separate contracts are alleged in the complaint, one for improvement district 77, and one for improvement district 80; that separate bonds were written to secure the performance of these several contracts; that three improvement districts, numbered 77, 78, and 80, are mentioned in the notice of claim filed with the city clerk, and that neither the notice nor the complaint segregates the value of meats, provisions, and supplies furnished on account of one district from those furnished on account of another. Appellant insists that the complaint is insufficient, for the reason that the notice of claim embraces three separate local improvement districts and makes a single claim against "the bond," not bonds, for $526.15; while the complaint alleges that supplies were furnished on account of two contracts in districts 77 and 80, thereby making the claim and complaint too indefinite for enforcement; and that the respondent has failed to segregate the items furnished under the various contracts, or to state the amounts claimed against the respective bonds.

The controlling question before us is whether the notice of appellant's claim is sufficient to sustain its alleged cause of action. As above stated, the notice sets forth three contracts, but specifies one bond only. There is no apparent method

by which we can determine whether the supplies were furnished for all three of the contracts, for two, or for one, or what proportion was furnished to any one. The notice of claim says the supplies were furnished for the carrying on of "said contract," but fails to indicate which contract is meant. The bonds mentioned in the complaint were separate and were given to secure the performance of separate contracts. It is apparent that a cause of action cannot arise upon one bond for supplies and materials furnished to aid in the performance of a contract secured by another bond. It is impossible to determine from the notice of claim what proportion of the supplies respondent claims was furnished towards the performance of the contract for district 77, what for district 78, or what for district 80. It would seem that the notice, although in substantially statutory form, in view of the several bonds pleaded, is so vague, indefinite, and uncertain in its terms and recitals that it cannot be held to constitute a compliance with the requirements of the statute.

A notice of claim, under contracts such as these, is quite analogous to the claim of a materialman under the mechanics' lien law. A lien notice under the latter statute must be sufficiently definite to enable the court to determine the particular property upon which the lien is claimed, and the amount of material supplied and used. In *Sarginson v. Turner Inv. Co.*, 69 Wash. 234, 124 Pac. 379, the plaintiff sought to foreclose a single lien for labor and materials furnished toward the construction of four separate dwelling houses. It appeared that the claimant did not keep separate accounts with these buildings, but that he sought to enforce a single lien against all four houses. We held this could not be done, because of his failure to segregate the specific amount of materials furnished towards and used in each building.

If respondent can present one general notice of claim for supplies furnished towards the fulfillment of two separate

contracts without segregation, and can thereby enforce a liability against a surety upon two separate bonds given to secure such contracts, there is no reason why it could not enforce a single claim on account of twenty or more construction contracts, the performance of which was secured by a like number of separate bonds. The notice of claim indicates that some of the supplies might have been furnished on contract 78. It neither appears from the notice nor from the complaint whether any bond was given to secure the performance of that contract. The presumption is that such a bond was given, but there can be no presumption that appellant was surety upon that bond. If any of the supplies were used in the performance of that contract, the bond executed by appellant certainly could not be held for such supplies. We are compelled to hold the notice of claim filed with the city was insufficient, and the complaint failed to state a cause of action.

The judgment is reversed, and the cause remanded with instructions to sustain the demurrer.

CHADWICK, ELLIS, and MAIN, JJ., concur.

[No. 12261. Department One. March 23, 1915.]

F. W. LORENZ, *Appellant*, v. F. A. BOOTH, *Respondent*.[1]

PHYSICIANS AND SURGEONS — NEGLIGENCE — WHAT CONSTITUTES. Where there is more than one method of treating a fractured bone, the attending surgeon is not liable for an honest mistake of judgment in selecting a method recognized as proper by a respectable minority of the medical profession.

PHYSICIANS AND SURGEONS—MALPRACTICE—ACTIONS — EVIDENCE—SUFFICIENCY. In an action to recover damages for malpractice in the treatment of a broken leg, on the ground of resulting infection to the limb, the evidence is insufficient to sustain a recovery, where it appears that the surgeon adopted the Lane, or plate, method for uniting the fracture and that the bone united properly, leaving the leg straight and of normal length; that infection set in, requiring prolonged treatment and the calling in of another physician to eradicate it; that infection may occur in any surgical case though carefully guarded against; but there was no evidence that the infection was caused by the method of setting the leg, or that every precaution looking to the prevention of infection was not exercised at the hospital where the leg was set.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 8, 1913, upon granting a nonsuit, dismissing an action for malpractice, tried to a jury. Affirmed.

Brady & Rummens and *T. B. McMartin*, for appellant.

Ballinger, Battle, Hulbert & Shorts and *Peters & Powell*, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages from the defendant, a practicing physician of Seattle, claimed to be the result of his negligence in the treatment of the plaintiff's broken leg. Upon the trial, at the close of the evidence introduced on behalf of plaintiff, counsel for the defendant moved the court to withdraw the case from the jury and render judgment in his favor, upon the ground that the evidence introduced in the plaintiff's behalf was insufficient to

[1]Reported in 147 Pac. 31.

call for the submission of the case to the jury. This motion was granted, and judgment rendered accordingly. From this disposition of the cause, the plaintiff has appealed.

On January 4, 1910, appellant's left leg was accidentally broken. The injury consisted of a simple fracture of the tibia. There was at that time no outward evidence showing that the tibia was in fact broken, the skin and flesh being unbroken and the leg apparently in normal alignment. The respondent was called shortly thereafter to treat the injury and, upon examination, discovered that the tibia was broken about four inches above the ankle. Respondent then set the broken bone and placed the leg in splints, it being necessary to place the appellant under an anaesthetic in so doing. Respondent then discussed with appellant and his wife the various methods of treating fractures of this nature, particularly as to reuniting and holding the broken ends of the bone in place while healing. Respondent advised that the broken bone be reunited by the so-called Lane method, consisting of opening the flesh and inserting and attaching to the broken portions of the bone a plate so as to rigidly hold them in apposition and alignment. Respondent advised this method of treatment in preference to other methods by which the bone is held in place by outward appliances without cutting the flesh, expressing the opinion that quicker and better results would follow. This method of treatment being consented to by appellant and his wife, they relying upon respondent's advice, upon the following day appellant was taken to the hospital, where the operation and the insertion of the plate securing the broken portions of the bone in place was performed and the leg placed in a cast. Appellant remained at the hospital six days.

The evidence does not furnish any information as to what occurred at the hospital other than that the operation was performed. No details are shown throwing any light upon the manner of performance of the operation, nor as to the care or want of care there exercised relative to possible in-

fection of the injured parts. Appellant was then taken home, when the respondent cut a hole in the cast so as to render the flesh wound accessible for treatment, and then it was first discovered that the injured parts had become seriously infected. The broken parts of the bone thereafter grew together without resetting, so that they are in good alignment and there is no shortening of the leg.

In May, 1910, the plate was removed by the respondent, and because of the infection which still persisted and with a view of overcoming it, respondent operated upon the leg again in August, 1910, and in January, 1911, otherwise treating it at intervals since the injury was received. Appellant then being dissatisfied with the respondent's treatment, placed himself under the care of Dr. Gardner, who in treating the leg, with the view of overcoming the infection, operated upon it in June and October, 1911. None of these operations by respondent and Dr. Gardner involved the resetting of the broken bone; the first setting of it being followed by practically perfect results, so far as alignment and maintaining the normal length of the leg is concerned. At the time of the trial, the leg had practically regained its normal condition, except that it was not fully recovered as to its strength. Appellant was able to resume his usual work during only a portion of the time during the two years while being treated by respondent and Dr. Gardner. It is plain from the evidence that the only serious results to appellant, aside from the suffering and loss which would necessarily in any event flow from such an accident, is the infection which occurred, we assume, from some cause after the injury occurred.

Counsel for appellant proceed upon the theory that respondent was negligent in treating the broken bone by the adoption of the so-called Lane method, which required the opening of the flesh to the bone in order to attach the plate thereto, and that he was thereafter negligent in using unsterilized water and the vessel in which it was used to cleanse the injured parts when treating them. It is insisted that

the evidence warrants the conclusion that the infection came from one or the other of these causes, and that neither the use of the Lane method, nor the use of water in the vessel in its alleged unsterilized condition, are recognized by the medical profession as proper treatment.

The only information furnished by this evidence as to the Lane method being an improper method of treatment of a fracture of this nature by the medical profession, is that furnished by Dr. Gardner, the appellant's own physician. While he testified that the Lane method was probably not the best method of treatment of a fracture of this nature in the first instance, he testified, in part, relative to that method and its recognition by the medical profession, answering hypothetical questions of counsel describing this fracture, as follows:

"A. The first part of the question as to the reduction, I think the profession would be unanimous in reducing it and immobilizing it if possible, keeping it simple. If impossible to keep it simple and immobilize it, then we resort to the more radical means—we have authority for any means, and that is where the profession is split. At that time there was—I hardly know what word to use, but the journals were full of the introduction of the Lane plate at that time. The profession was so split that I can't tell you which predominated and which didn't. Later we don't believe that the Lane plate is universally used. Q. It was in an experimental state, do I understand at that time? A. The only part of that that I don't believe, it may be—this isn't positive with me, but I don't believe the majority of the profession would have operated quite so early. I wouldn't have, but Dr. Booth had authority for so doing. That is my honest belief. After that infection, the treatment from there on as conducted by Dr. Booth was all that anybody could have done. I would have done it; that is fighting the infection after the introduction."

He testified upon cross-examination as follows:

"Q. At that time in 1910, and from there on, this plate method was advocated then by a large part of the profession of surgeons, was it not? A. It was then and is now. Q. And

used by them? A. And is yet, as the last resort. I use it, I think every surgeon uses it when we fail in our simpler methods. Going back to my earlier testimony, we simplify these things, but being sure we get reduction and immobilization. Q. The first object to be attained beyond all others is reduction and immobilization, which means to get those bones fastened together in some manner as nature has originally made them, so they are going to grow back there, is that a fact? A. That is the fact, that is what I testified to. Q. Now the plate method is the best mechanical device of getting them put back in that shape, is it not? A. The plate method I think today is resorted to after the other methods have failed, I think except by Lane and some of his followers. I think they are in the minority today. Q. I am referring now to January, 1910, was that not a fact at that time, they resorted to that both early and late? A. What do you mean by early? . . . Q. What I am speaking about is this, at the time this operation was performed, the practice was quite general amongst those advocates of the Lane method of using the Lane method both early and late, is that not a fact? A. That word 'early' is what I will have to hinge on. Do you mean within an hour or so, do you mean within a week, or do you mean before primary union has taken place? Q. Yes, I mean within twenty-four hours? A. I don't believe the profession was unanimous, or in the majority, in the immediate operation. Q. I am not asking you who was in the majority, but wasn't that a method that was very generally advocated by a large number of reputable and skillful surgeons? A. It was advocated. Q. And used? A. Yes, sir. Q. And is yet? A. By some. Q. Now the difference that you contend for is that recently it has been contended that the Lane method ought not to be used until some little while after, seven or eight days after the injury, because of the traumatism that is supposed to exist, or may exist immediately or soon after the injury? A. Yes, by the followers of Lane. Q. But at that time those same men, and a large proportion of reputable surgeons, applied that method immediately after the injury as well as later, did they not? A. I don't believe a large proportion, but there were followers of that—Q. And reputable men? A. Reputable men."

The most that can be said of this testimony in support of appellant's contention that respondent was negligent in

adopting the Lane method, is that such method did not have at that time the unanimous approval of the medical profession. However, according to the only evidence here presented in appellant's behalf, that method did have the approval of at least a respectable minority of the medical profession who recognized it as a proper method of treatment. This, we think, is enough to absolve respondent from negligence, so far as his mere use of that method is concerned, there being no showing that he exercised other than his best judgment in choosing that method. In *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. 880, this court recognized the rule that if there be more than one recognized method applicable to a particular case, the attending physician is not liable for an honest mistake of judgment in his selection of the method of treatment.

Is there any other evidence calling for the submission to the jury of the question of respondent's negligence, resulting in the infection? We have already noticed that there is no evidence whatever as to what occurred at the hospital other than the mere fact that the first operation was there performed during the six days appellant was there under treatment. There is not the slightest evidence but that every precaution known to medical science was exercised at the hospital looking to the prevention of infection. Yet the infection was discovered and had become serious at the end of that period. Up to that time we have nothing whatever pointing to negligence upon the part of respondent, unless the mere fact that infection had taken place is to be regarded as proof of his negligence.

Some contention is made that the respondent was thereafter negligent in the use of unsterilized water and the vessel in which it was used from time to time. The vessel, as it appears, was a common wash basin which was cleansed with warm water and soap by appellant's wife before use, and when the water was put into it respondent would put into the water some kind of antiseptic tablets the exact nature of

which are not shown. It is true that Dr. Gardner does give some testimony which suggests that possibly the water was not sufficiently sterilized, but in view of the uncertainty as to what the sterilizing antiseptic tablets used by the respondent consisted of, Dr. Gardner's testimony is of no substantial value as tending to show that the respondent's method of sterilization of the water would not ordinarily be insufficient or such as a prudent physician would use. Besides, we are to remember that the infection which respondent was combating during the whole period was that which was discovered when appellant was taken home from the hospital and which occurred before respondent had used the water and basin claimed to have been improper for want of sterilization. So we have then nothing of a substantial character which would lend support to appellant's claim of negligence on the part of the respondent resulting in the infection, other than the bad result. In other words, the mere fact that the infection occurred. In *Peterson v. Wells*, 41 Wash. 693, 84 Pac. 608, this court recognized the rule that a mere "bad result" is not of itself ordinarily sufficient to render an attending physician liable for negligence, that is, it is not ordinarily of itself proof of such physician's negligence. *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664; *Wurdemann v. Barnes*, 92 Wis. 206, 66 N. W. 111. See, note to *Whitsell v. Hill*, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830.

Counsel for appellant rely principally upon our decision in *Sawdey v. Spokane Falls & N. R. Co.*, *supra*, where a judgment of nonsuit rendered by the trial court was reversed. A critical reading of that decision will show that there was evidence there of a somewhat pronounced character tending to show that the treatment of the injury was not the usual method of treatment. Also that a second operation upon the bone was necessary to obtain proper alignment. Counsel urges especially that the operations performed in this case, after the setting of the bone by respondent, were some evidence of improper treatment in the beginning. These opera-

tions, however, were not for the purpose of correcting the setting of the broken bone. We have noticed that there was no defect in that respect, since the leg was not shortened nor was it out of alignment. These subsequent operations show only the existence of the infection and were solely for the purpose of treating the infection. They throw no light whatever upon the cause of the infection, and we have Dr. Gardner's testimony to the effect that infection may occur in any surgical case though carefully guarded against, and that in this particular case the infection does not of itself furnish any evidence of its cause, nor want of care on the part of respondent. Counsel, also, in support of this branch of their argument, rely upon *Peterson v. Wells, supra.* That decision, however, we think is not materially different in principle from that of *Sawdey v. Spokane Falls & N. R. Co., supra,* and is in the same way distinguishable from the present case.

Finally, we conclude that to have allowed this cause to be submitted to the jury would be to merely permit it to speculate upon the question of respondent's negligence. We think there are no substantial facts shown, in any view of the case, to warrant such submission to the jury. The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 12060. Department Two. March 24, 1915.]

In the Matter of the Estate of NICK WELCH.

CORA WELCH, *Appellant*, v. MARTIN WELCH, *Respondent*.[1]

PARTNERSHIP—RELATION—EXISTENCE—EVIDENCE—SUFFICIENCY. In a proceeding for the appointment of a partnership administrator of a decedent's estate, findings that a saloon business was the partnership business of the deceased and his brother, are sufficiently supported by the evidence, although the deceased paid one-half of the purchase price of $14,000 from his own funds and gave his own obligations to secure the balance, the business was conducted in his name, and no division of profits was made, where it appears that he repeatedly declared that his brother had an interest in the business, and was a partner therein, that the brother actively participated in the management, doing half the work, and drew no fixed wage, that he kept the books, made deposits and performed the general duties of a partner; that the unpaid portion of the purchase price was entirely paid from the proceeds, and the sum taken from the business by deceased was no more than his advances and reasonable interest.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered March 13, 1914, upon findings in favor of the defendant, granting an application for the appointment of an administrator of partnership property. Affirmed.

Clark & Lockhart, for appellant.

H. J. Snively, for respondent.

FULLERTON, J.—Nick Welch died intestate in the city of North Yakima on July 26, 1913. He left surviving him a widow, but no issue, and his next of kin were two brothers, Martin Welch and John Welch. At the time of his death, the decedent and his brother Martin Welch were conducting a saloon in North Yakima in the name of the decedent, which with the appurtenances and fixtures and stock on hand had a value of some $3,055.70. There was also on deposit, as the proceeds of the business, in a local bank at North Yakima the sum of $706.67, and on deposit in a bank at Tacoma of

[1]Reported in 147 Pac. 4.

$7,500, each in the name of the decedent, Nick Welch. Some three days after the death of Nick Welch, a petition was prepared by Martin Welch's attorneys and executed by the widow, praying for the appointment of Martin Welch as administrator of the decedent's estate. In this petition, the property above mentioned was described as the partnership property of the decedent and Martin Welch. When the petition was being read to the court on the day appointed for the hearing thereon, the widow called attention to this allegation in the petition in a manner which indicated that she had not theretofore understood its purport. The court, however, granted the prayer of the petition and appointed Martin Welch as such administrator. Martin Welch thereupon qualified as such administrator by taking the required oath and giving bond, but later on his bondsman withdrew from the bond, and he was appointed special administrator, pending the reappointment of a permanent administrator.

Up to this time, Mrs. Welch had not been represented by counsel, further than the attorneys of Martin Welch can be said to have represented her. She thereupon procured counsel of her own selection and petitioned the court for the removal of Martin Welch as special administrator, praying that letters of administration be granted to her; averring in the petition that the property of which her husband died possessed was the community property of herself and her husband; that Martin Welch had no interest therein as a partner of her husband or otherwise; that she had been induced to sign the petition for the appointment of Martin Welch as such administrator reciting otherwise under a mistake as to its contents, and because of fraud and deceit practiced upon her by Martin Welch and his attorneys. Issue was taken on the allegations of the petition of Martin Welch, who also presented a counter petition averring that he was a partner in the business conducted in the name of Nick Welch, and praying that he be appointed administrator of the partnership. A trial was had upon the allegations of the petition and counter pe-

tition, in which the ownership of the business was put in issue, resulting in a decree of the court, finding "that at the time of the death of Nick Welch, to wit, on the 26th day of July, 1913, cross-petitioner, Martin Welch, and said Nick Welch, deceased, were copartners in the ownership of the saloon business conducted by said Nick Welch, deceased," and an order directing that letters of administration of the partnership estate be issued to him. This appeal is from that decree and order.

It is not questioned in this court that the trial court had jurisdiction to determine the issues presented by the petitions in this form of procedure, and the sole question argued by counsel is whether the evidence justified the conclusion of the trial court that the business conducted in the name of Nick Welch was in fact the partnership business of the decedent and Martin Welch. Much evidence has been introduced by each of the parties tending to support their respective contentions, and we are constrained to say, after its careful perusal, that it leaves no abiding conviction in our minds in favor of either contention. On the one side, are the outward circumstances; the fact that the purchase of the business was negotiated alone by the decedent; that he paid from his own funds one-half of the very considerable purchase price of $14,000; that he gave his own obligations to secure the remainder; that the business was conducted in his individual name, and that no division of the profits was ever made. On the other side, we have the repeated declarations of the decedent, commencing at a time when the negotiations for the purchase of the business were pending and extending down to a short period before his death, to the effect that his brother had an interest in the business and was a partner therein. Added to this, is the active participation of the brother in the business; that he drew no fixed wage; that he took care of one of the two shifts in which the parties divided the business day; that he kept the books of the concern; kept charge of the daily cash receipts; made the local deposits of

receipts, and generally performed duties that pertained to a partner rather than an employee. Again, the obligations given to represent the unpaid portion of the purchase price of the business were entirely paid out of the proceeds of the business, and the sum taken by the deceased and deposited in the Tacoma bank was no more than the sum he had originally invested therein, plus a very moderate rate of interest for the time the business had its use.

But it would unduly prolong this opinion without purpose to detail the evidence. It received the painstaking consideration of the trial judge, as is evidenced by the able and carefully considered opinion he filed in connection with his findings. We are unable to conclude that the evidence preponderates against his findings, and under the rule, are constrained to affirm his decree. It is so ordered.

MOUNT, CROW, ELLIS, and MAIN, JJ., concur.

[No. 12309. Department One. March 24, 1915.]

C. C. SMITH, *Respondent*, v. ORR COMPANY, INCORPORATED, *Appellant*.[1]

BROKERS — LIABILITIES — RETURN OF MONEY. Where an option holder on a tract of land arranged with a broker for its sale in parcels in case he should secure title or make satisfactory arrangements with the owner, and delivered to the broker sale contracts executed in blank with the understanding that they were merely tentative, and the broker made sale of a tract without his principal having secured title, the broker is liable upon his promise to the would-be purchaser for a refund of the money paid, since his act in making sale beyond his authority was sufficient consideration for the promise.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 24, 1914, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

[1]Reported in 147 Pac. 1.

Charles P. Harris, for appellant.

Henry W. Lung, George W. Bright, and *Brightman, Halverstadt & Tennant*, for respondent.

CHADWICK, J.—In June, 1910, one Phil. L. Serwe held certain lands under an option contract. He consulted defendant with a view to putting the property upon the market. It was suggested to him that the way to accomplish his purpose would be to make a contract providing for a release of the property as it was sold. A contract was accordingly drawn up by defendant and signed by it and by Serwe and wife. This was submitted to the owner, Mabel H. Huggins, of Tacoma, who after several ineffectual attempts to induce her to sign were made, refused to do so. Another contract was drawn by Serwe's attorney. This the parties believed would meet her approval. It provided for certain measures of protection not found in the first contract. This she also refused to sign. Pending these negotiations, and because defendants were real estate agents who were desirous of taking advantage of the summer season, a certain form of contract of sale was drawn up and printed. Serwe and his wife signed twenty-nine of these forms executed in blank, to be delivered to intending purchasers, but as they contend, and the court found, not until some satisfactory arrangement had been made with the owner or title had passed to them. Defendants' agent, Mr. Green, who had charge of this particular transaction, caused a number of these contracts to be filled out and delivered to prospective purchasers, most of them employees in the office of the defendant. One of them was made out and delivered to the plaintiff in this case. The contracts were executed in triplicate.

Serwe was unable to meet the options of his contract with Mabel H. Huggins and brought into the transaction a third party, one Murphy, who supplied the money and took title to a part of the land. All of the contract holders have been

disposed of except plaintiff, who has brought suit against defendant to recover the amount paid by him.

Pending the transaction between Murphy and Serwe, and at a time when the parties were mutually negotiating with reference to clearing the title of the contracts which had been recorded, defendant took its copy of the Smith contract and put it on record. The court found, and there is testimony to sustain the finding, that in these negotiations the defendant, who had received and held all of the money that had been paid by Smith, promised to pay it back to him. We think there is a sufficient consideration to support this promise. Appellant was the agent of Serwe; it had collected all payments upon the Smith contract and held the fund. The dispute between the parties was as to whether defendant had authority to fill out and deliver the contracts which had been signed in blank. The court found that it had not. It was therefore liable to Serwe as for a breach of its trust, and the compromise of their mutual dealings is a sufficient consideration for the promise of the agent to pay a demand which Serwe might have otherwise been required to pay in the first instance.

"An agent who assumes to act for a principal whom he has no authority to represent is liable to a third party who is misled to his prejudice by the agent's acts." *McReavy v. Eshelman*, 4 Wash. 757, 31 Pac. 35.

The testimony to sustain the promise was admitted without objection; no exceptions were saved and the promise inheres in the judgment.

It is contended that this is really a case between Serwe and the appellant, and that inasmuch as statements were rendered from time to time which show these contracts, that there can be no recovery. We think the record will hardly sustain the contention that the interest of Serwe and Smith are identical, nor is it sufficiently clear that the statements were received without objection by Serwe. In fact, he utterly

contradicts appellant's testimony. He testified that objection was made immediately upon finding out that defendants were dealing with the property; that he was assured that the contracts which had been issued were tentative contracts and would be of no force or effect unless an arrangement was made with the owner so that the property might be sold. The lower court found against the appellant upon all of the material issues of fact. We have examined the testimony and are not prepared to say that his findings are not sustained by a preponderance of the evidence.

We find that the sale was made without authority, and appellant is liable to respondent for the amount collected on the contract.

Other questions are raised, but upon this view of the case, they become immaterial.

Judgment affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and PARKER, JJ., concur.

[No. 12128. *En Banc.* March 26, 1915.]

In the Matter of the Assessment for LOCAL IMPROVEMENT SEWER DISTRICT NO. 1 OF THE CITY OF CHEHALIS. W. J. MURPHY, *Appellant*, v. P. SUMMERSETT *et al.*, *Respondents.*[1]

MUNICIPAL CORPORATIONS — ASSESSMENTS — APPEAL — NECESSITY. The general local improvement law, 3 Rem. & Bal. Code, § 7892-1 *et seq.*, providing for notice to abutting owners of a hearing upon assessment rolls for local improvements, and for appeals to the superior court, and providing (§ 7892-70) that rights of action under existing laws, not commenced at the time the act takes effect, shall proceed under the provisions of the act, supersedes the prior acts whereby the property owners could obtain relief by an action in equity, and owners must now appeal or abide by the decision of the council, where the act went into effect before the assessment roll was made out, although the proceedings were commenced prior thereto under which the contract for the work was made.

SAME—ASSESSMENTS—APPEAL—CHANGE OF PROCEDURE—RIGHTS OF CONTRACTOR. Although the new act could not affect any of his rights under his contract, a contractor for a local improvement has no such interest in the procedure by which the rights of the parties assessed could be asserted by action in equity, as to be able to object to a change in the procedure requiring owners to appeal to the superior court from a confirmation of the assessment roll, which manifestly did not prejudice his rights under his contract.

JUDGMENTS—RES JUDICATA—MATTERS AND PARTIES CONCLUDED. A judgment in mandamus, at the suit of a contractor against a city, compelling the city to levy an assessment to pay the cost of a local improvement, is not *res judicata*, upon an appeal by a particular property owner, upon the question of the amount of benefits, if any, legally assessable against his property, he not being a party to the former action and the question of benefits not being there involved; the former decision being merely that property owners were liable for assessment to the extent of the benefits received by them.

Appeal from a judgment of the superior court for Lewis county, Edward H. Wright, J., entered April 20, 1914, upon findings in favor of the defendants, setting aside an assessment for a public improvement, on appeal by property owners from the confirmation of the assessment roll. Affirmed.

[1]Reported in 147 Pac. 199.

Boyle, Brockway & Boyle and *Forney & Ponder*, for appellant.

Preston & Thorgrimson and *C. A. Studebaker*, for respondents.

PARKER, J.—This is an appeal by W. J. Murphy from a judgment of the superior court for Lewis county, setting aside and cancelling special assessments levied by the city commission of the city of Chehalis upon property of P. Summersett *et al.*, to pay the contract price claimed by Murphy to be due him for the construction of sanitary sewers in streets upon which such property fronts. The controversy came into the superior court by appeals prosecuted by Summersett *et al.* from the levy and confirmation of the assessments by the city commission. Murphy was brought into the case as a party thereto in the superior court at the instance of the city, he being the contractor in whose interest the assessments were levied, and the decision of the superior court being adverse to his interests, he has appealed therefrom to this court. The city has not appealed. The city of Chehalis adopted the commission form of government, after creating this local improvement district and before the making of this assessment roll, so the word "commission" as here used means the same as "council."

It is first contended by counsel for Murphy that the superior court erred in assuming jurisdiction to entertain the appeal of Summersett *et al.* from the levy and confirmation of the assessment by the city commission, because, at the time of the creation of the local improvement district and the entering into the contract with the city by Murphy for the construction of the improvement, there was no statute in force in this state authorizing such appeal. In the summer of 1910, proceedings were regularly taken by the city providing for the construction of the improvement and the creation of the local improvement district looking to assessing the cost thereof against the benefited property. The

contract for the construction of the improvement was thereafter duly entered into by the city with Murphy in January, 1911, by which he was to complete the improvement on or before November 1, 1911. He claims to have completed it and that it was accepted by the city on October 30, 1911. It is plain from the provisions of the resolution and ordinance providing for the improvement and the creation of the local improvement district that no part of the contract price was to be paid and no assessment levied therefor upon the abutting property until after completion of the improvement and the acceptance thereof by the city. Hence there could be no right on the part of Murphy to have the assessment made prior to October 30, 1911. Prior to June 7, 1911, there was no statute in force providing for direct appeal to the courts from the confirmation of local assessments by cities of the third class, to which class the city of Chehalis belongs. The remedy the property owners had against an illegal and erroneous assessment was by an action on the equity side of the court to set aside the assessment, or by way of defense, in an action by the city seeking foreclosure of the assessment lien. On that day, however, there became effective the general local improvement law of 1911 (Laws 1911, p. 441, ch. 98; 3 Rem. & Bal. Code, § 7892-1 *et seq.*), applicable to cities of the third class, as well as other cities and towns in the state, providing, among other things, in substance, that, whenever any assessment roll for local improvements is made it shall be filed with the city or town clerk; that the city council shall thereupon fix a date for the hearing of objections of property owners to the assessments sought to be so made, notice of which shall be given to the property owners, and that upon final decision of the council confirming the roll, after such revision thereof as the council may make, any owner of property deeming himself aggrieved by such assessment may appeal therefrom to the superior court, where the decision of the council may be affirmed or modified or the assessment en-

tirely annulled in so far as the same affects the property of the appellant. Laws of 1911, pp. 452, 453, §§ 21, 22 (3 Rem. & Bal. Code, §§ 7892-21, 7892-22).

It is apparent from the reading of this law that the property owner has a right, both before the council and in the courts upon appeal, to be heard upon the questions of benefits flowing from the construction of the improvement to his property and the proper apportioning of benefits between his property and other property in the district. Prior to the passage of this law, the property owner was not awarded a hearing before the council in cities of the third class, nor upon direct appeal to the courts; but the law did award him an opportunity to contest in the courts the validity of an assessment sought to be made against his property, upon the ground of want of benefits as well as other grounds. The effect of this law, in so far as we are here concerned with its provisions, is only to change the method of procedure by which the property owner may assert his rights as against an erroneous or void assessment.

The repeal provisions of this law render it plain that it supersedes all laws and methods of procedure touching local assessments by cities and towns. Section 70, Laws 1911, p. 480, provides:

"All rights of action under existing laws which this act in any way supersedes or repeals, if the same at the time of taking effect of this act shall not have been commenced, shall proceed under the provisions of this act." 3 Rem. & Bal. Code, § 7892-70.

We have seen that Murphy's right to have an assessment made to pay the cost of the improvement could in no event have accrued until October 30, 1911, when he claims to have completed his contract. This law was in force several months prior to that date. It seems plain to us that it was proper for the city council to proceed with the making of the assessment roll and the hearing thereon in compliance with the provisions of this law, and that Summersett *et al.* had the

right of appeal to the courts as therein provided. Of course, Murphy's rights, secured by his contract with the city for the construction of the improvement, could not be affected by any law passed subsequent thereto, but we think he had no such interest in the mere method of procedure by which the property owners' rights might be asserted as against the assessments as would prevent the legislature from providing this different method of procedure in that respect, which manifestly did not prejudice Murphy's right under his contract in the least. This law does not accord to the property owner any rights as against Murphy superior to those possessed by the property owner under the prior law. Indeed, under this law, the property owner is required to make his objections to the assessment within a definite limited time, or submit to the confirmation of the assessment by the council as a final adjudication against him. Such was not the case under the prior law; but the property owner, not having notice of hearing before the council touching the validity of the assessment, had an indefinite time, measured by many varying circumstances, to challenge the validity of the assessment in the courts. This new procedure is more conducive to a prompt and final settlement of the question of the validity of the assessment than the old law was. Surely there is nothing in this for Murphy to complain of. We conclude that Summersett *et al.* not only had the right of appeal from the decision of the city council confirming this assessment roll, but that they were by law required to so appeal or abide the decision of the council as final against them.

It is next contended by counsel for Murphy that all questions raised and determined upon the appeal of Summersett *et al.* to the superior court in this case had theretofore been finally determined and became *res judicata* as against them by the prior judgment of the superior court for Lewis county and the decision of this court affirming the same in the mandamus case of *State ex rel. Murphy v. Coleman*, 71

Wash. 15, 127 Pac. 568. Neither Summersett nor any other owner of property within this local improvement district was made defendant in that action. Indeed, it may well be argued that they could not have been, in view of their right to be heard before the council and upon appeal therefrom to the superior court, in so far as there could be affected by the judgment in that case the question of benefits resulting to their property from the construction of the improvement and the proper apportionment thereof. We pass this question, however. It is enough for our present purposes to know that the city commissioners of the city of Chehalis were the only parties pretended to be made defendants in that case.

It is now insisted, however, by counsel for Murphy that the city commission was in effect there defending not only for the city, but for all the owners of property within the local improvement district, upon substantially the same grounds as are here urged by Summersett *et al.* against the levying of an assessment against their property to pay the contract price of the improvement, and that therefore the judgment rendered in that case requiring the city commission to proceed with the making of the assessment was in effect a final judgment, binding alike upon all the owners of property within the district as well as upon the city, as to all possible objections which might be made by these owners against the assessments, including the question of benefits, excepting only the mere apportionment of such benefits to the several lots and tracts within the district. We shall not attempt to draw any distinction between the issues involved in that mandamus case against the city commission and the issues here involved, aside from the mere difference in parties. It might be well argued that the final judgment rendered against the city commission in that case, read in connection with the language of the alternative writ of mandamus therein, does not in terms amount to an adjudication upon the question of the ultimate power of the city com-

mission to levy assessments against the property of Summersett *et al.* We pass these questions and assume, for argument's sake, that the rights of Summersett *et al.* are saved from the effects of that judgment only by the fact that they were not parties to that action.

Counsel for Murphy invoke the general rule that a final judgment rendered by a court of competent jurisdiction for or against a municipality, adjudicating a matter of general concern to its citizens and taxpayers, is binding alike upon the municipality and all of its citizens and taxpayers in so far as there is thereby adjudicated such matter of general concern, in the absence of fraud or collusion attending the rendering of such judgment. This doctrine has been recognized and adhered to by this court in *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25, and *State ex rel. Forgues v. Superior Court*, 70 Wash. 670, 127 Pac. 313. When it is sought to bind a citizen or taxpayer of a municipality by the application of this doctrine, it must be remembered that he is not, by such a judgment, precluded from asserting any right which he holds as an individual peculiar to himself and which he does not share with the public. This limitation of the doctrine is noticed in the text of 23 Cyc. 1269, quoted with approval by this court in *State ex rel. Forgues v. Superior Court, supra.* Now the right of the owner of property which is sought to be charged by special assessment with a portion of the cost of a local improvement to have the amount of such charge limited by the value of the benefits resulting to his property, as well as to have the whole cost apportioned between his and other property in proportion to benefits, is a right peculiar to himself and not shared with others. True, all other owners of property sought to be assessed have the same right accorded to them by law, but each has the privilege of asserting his right independent of all others, in so far as there may in any manner be drawn in question the amount of the benefits resulting to his property. There has come to our

notice only one decision of the courts dealing with the attempted application of the doctrine invoked by counsel for Murphy to special assessments which we regard as directly in point here, and that is the decision of the supreme court of Wisconsin in *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408. In the controversy there involved, there had been rendered a judgment in a mandamus proceeding awarding a peremptory writ against the common council of the city of Appleton, commanding them to reassess a special tax of $81.11 upon a certain tract to pay in part for the grading of the street upon which it fronted, a prior assessment having been set aside. It seems that no notice of hearing or direct appeal from the local assessments to the courts was awarded by the statute of Wisconsin to the property owner, but he had his remedy in equity, either by suit to cancel the assessment, or by way of defense, when foreclosure of the assessment might be attempted, the same as those rights might be asserted by a property owner in this state prior to the passage of our local improvement law of 1911. After levying of the reassessment in compliance with that mandamus judgment, Rork brought an action in equity to set aside the assessment, resulting in a judgment in the trial court in his favor. One of the grounds upon which it was insisted that such judgment was erroneous was that the mandamus judgment against the city council was binding upon Smith, the property owner, as well as the city, rendering the assessment *res judicata* as against him. Disposing of this contention upon appeal, the supreme court, at page 73 of the official report thereof, said:

"In the case of the *mandamus* proceedings it seems to us very clear that the common council did not represent the rights of the plaintiff. The proceeding was a direct proceeding to charge the plaintiff's property with the payment of a claim owned by the defendant *Reeder Smith*, and which he claimed was chargeable to and payable out of the property of the plaintiff. The plaintiff was the only one interested in resisting the claim of *Smith;* and if he can be barred

of his right to contest the validity of the charge by a proceeding to which he is not a party and of which he has legally no knowledge, it would seem to be contrary to the well settled rule of law that no person is bound by any judgment in an action to which he is not a party unless he claims his right under some one who was a party thereto. This case cannot be governed by the rule which binds all the tax-payers of a municipality by the judgment of a court of competent jurisdiction declaring that the claim of the party against it is a valid claim. In the case of a claim made against the city, town, county or other municipality, the claimant cannot make the tax-payers, to whose property he must ultimately resort for the payment of his claim, parties to his action to determine its validity; and the municipality in its corporate capacity is the party with which the contest must be made. In an action of that kind the municipality, by its officers, represents the rights of the tax-payers whose property must ultimately pay the demand. The claim, in such case is a claim against the municipality and not against the tax-payers; but when established against the municipality, the property of the tax-payer becomes bound to pay his quota of the tax necessary to discharge the debt. This is all that was determined in the case of *Clark v. Wolf*, 29 Iowa, 197, cited by the learned counsel for the respondent. In the case at bar, *Smith* had no claim against the city of Appleton; he had simply the right, if he had any right, to invoke the action of the city authorities to aid him in enforcing his claim against the property of the plaintiff; and the fact that he compelled them to act by the writ of *mandamus* can give no more force to their action than if it had been done voluntarily, unless the party to be affected by their action was also made a party to the proceeding. They were the mere agents of the holder of the claim to enforce it against the plaintiff; and if they had no legal right to enforce the claim, the plaintiff must have the right to contest its validity when the attempt to enforce the same is made in a way which affects his rights."

No decision relied upon by counsel for Murphy lends more substantial support to their contention than that of *Ashton v. Rochester*, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. 619. The question there decided is

stated in substance in the syllabus to the official report of that case as follows:

"Where a writ of mandamus is awarded by a competent court against a board of officers of a municipality, having power to let contracts for works of local improvement, requiring them to let such a contract, and it is let in obedience to such a command and a local assessment duly made to defray the expenses, the power of the board to let the contract may not be questioned subsequently by the taxpayers in a collateral proceeding."

A reading of that opinion will show that there was not involved any question of benefits nor of the apportionment thereof against lands sought to be assessed to pay the cost of the improvement. The property owners were endeavoring to set aside and enjoin the collection of the assessment because of irregularities going to the question of the jurisdiction of the council to let the contract and proceed with the improvement; questions which affected all the owners of property to be assessed alike, and placed the property owners, according to the views of the court there expressed, in the same relative position as general taxpayers when there is drawn in question the validity of the levy of a general tax they might be called upon to pay. We do not think that decision is controlling here, where there is involved, in its final analysis, the question of the amount of benefits, if any, resulting from the construction of the improvement to the abutting property of *each particular owner of the several lots and tracts sought to be assessed.* The fact that the city and its officials might be estopped by that judgment upon all questions, or even that the property owners might be estopped by that judgment upon questions other than those of benefits, we think is not at all conclusive that they would be estopped from asserting this right which each holds as an individual peculiar to himself and not in common with others. One owner of property might be benefited to the full extent claimed, while another owner might not be ben-

efited at all. The right of the property owner to be heard as to the amount of benefits resulting to his property is not foreclosed by this mandamus judgment, whatever may be held as to its finality upon other questions.

Some remarks were made by this court in *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272, 28 L. R. A. (N. S.) 735, which might seem somewhat in harmony with *Ashton v. Rochester, supra*. The decision in that case, however, was upon the question of the statute of limitations as affecting the right of those entitled to have a reassessment levied to pay their claims, it being decided that the running of the statute was stayed by the commencement of an action against the city authorities to compel the levy of such an assessment. The view that a judgment against the city in such an action, upon that question, binds also the owner of the property to be assessed, does not by any means lead to the conclusion that judgment rendered against a city, like in this case, would be binding upon the owners of property to be assessed, in so far as the question of benefits to the particular property of each and the proper apportioning thereof is concerned. Even in litigation involving the validity of a general tax, where the rights of the taxpayer may be finally adjudicated against him in a suit by or against the municipality, he is not thereby precluded from questioning the valuation put upon his property for the purpose of measuring the amount of the tax he may be required to pay. Upon this question, he is usually accorded the right to be heard before a board of equalization, and he may also question it in a court of equity upon a proper showing. This is an individual right which he does not share with the public or other taxpayers, however much he may share with others his right to question the incurring of the indebtedness and the power to levy such a tax. It is necessary to a correct viewpoint of this case to remember that each objecting property owner is resisting the particular assessment against his own property, and that the controversy, so far as he is

interested therein, is as if he were the only property owner objecting to the assessment.

In the late case of *State ex rel. Murphy v. Wright*, 76 Wash. 383, 136 Pac. 482, wherein it was sought to prohibit the prosecution in the superior court for Lewis county of the appeal of Summersett *et al.* from the decision of the city council confirming this assessment, upon the ground that the assessment had been rendered *res judicata* as against Summersett *et al.*, this court, referring to the mandamus case against the city commission, said:

"We think there can be no doubt that, if the issues adjudicated in *State ex rel. Murphy v. Coleman, supra*, were finally decided and are binding upon the property owners, still the property owners have the right to contest before the commissioners the amount of the assessment levied against their lots. The statute gives them this right. Rem. & Bal. Code, § 7961; Laws of 1911, p. 452, § 21 (3 Rem. & Bal. Code, § 7892-21). The adjudication in the case above mentioned did not and could not go further than to determine the liability of the property owners to pay the cost of the improvement to the extent of the benefits received by their property; and they clearly have the right under the statute to have that question determined in the proper forum."

In view of the fact that the writ of prohibition there sought was denied by this court upon the ground that Murphy had the right of appeal from any decision of the superior court rendered in that proceeding, it may be suggested that the above quoted remarks of the court were to some extent dictum. We are of the opinion, however, that this is the law governing the rights of Summersett *et al.* We conclude that the judgment of the superior court for Lewis county, which was affirmed by this court in the mandamus case requiring the city commission to proceed with the levying of assessments, was not, and could not have been, *res judicata* of the rights of Summersett *et al.*, in so far as the question of benefits and apportionment thereof is concerned.

It is finally contended by counsel for Murphy that the

evidence presented to the superior court in this case calls for the conclusion that the several lots and tracts owned by Summersett *et al.* were in fact benefited to the extent of the several assessments apportioned thereon by the assessment roll made and confirmed by the city commission in obedience to the mandamus of the superior court. This presents questions of fact which we are convinced must be resolved in favor of Summersett *et al.* It is apparent from record of the proceedings had before the city commission in the making and confirmation of those assessments that the commission proceeded upon the theory that it was by that mandamus compelled to assess the entire contract price of the improvement upon the property within the district, and apportion the same to the property of Summersett *et al.*, regardless of its opinion as to whether or not such property was actually benefited. In this confirmation ordinance they make preliminary recitals amounting, in substance, to findings, as follows:

"Whereas, it appears to the city commission that said sewer has not been built in substantial conformity with said ordinance No. 345 and the contract, plans, and specifications, and that it will require the expenditure of more than twenty-eight thousand dollars to complete said sewer in accordance with said ordinance and contract; and, further, that no provision has been made for completing said sewer and that until it is completed said sewer cannot be used by the property owners in said district, and that in case said sewer is never completed the property in said district will receive no special benefits whatever from the same; and, further, that in case it should be completed in the immediate future the entire benefits flowing to the property in said local improvement district from that portion of the sewer now constructed would not exceed the sum of twenty-eight thousand dollars; and said commission further finding that as a matter of law it is bound by the mandate of the court to approve an assessment roll for the full contract price, with extras, not exceeding the estimated cost of fifty-six thousand dollars, notwithstanding the fact that said sewer is

not completed and the property does not receive special benefits in said sum of twenty-eight thousand dollars."

Reference to the decision of this court in the mandamus case of *State ex rel. Murphy v. Coleman, supra*, will show that the city was prevented from questioning the completion of Murphy's contract and the proper construction of the improvement because of the acceptance of the work by its city engineer; the substance of the decision being that the city, by estoppel, lost its right to so question the proper construction of the improvement. Were the improvement to be paid for from the general funds of the city, the result would probably have been to fix an obligation upon the city to pay the contract price. After hearing a large amount of evidence upon the question of the proper completion of the improvement and its possible use to the property of Summersett *et al.*, sought to be assessed, the superior court found:

"That the said defendant W. J. Murphy did not build said sewer in substantial conformity to the contract, plans and specifications and by reason thereof said sewer, as left by said defendant W. J. Murphy, could not be used and was not usable for the purposes for which the same was designed, or any other purpose. That the sewer as constructed by the said W. J. Murphy was not and is not usable by these appellants or other property owners in said district and did not and does not now confer any special benefit whatsoever upon appellant's said property, and appellant's said property or any portion thereof has not been benefited in any manner whatever by the construction of said sewer. That in order to substantially complete said sewer in accordance with the plans and specifications it is necessary that a large portion of the same be dug up and relaid at an expense of many thousands of dollars, and until such work is done no portion of said sewer can be used. That the said city of Chehalis has made no provision whatsoever for the completion of said sewer or any part thereof."

Now this assessment roll does not come to the courts with the strength of that presumption as to the benefits usually

attending the making of an assessment roll, in view of the commission's findings made in connection with the confirmation of the roll. Having in mind this fact, and having read all evidence produced before the superior court touching the question of benefits resulting to the lots and parcels of land belonging to Summersett *et al.*, we cannot escape the conclusion that the trial court made correct findings, as above quoted, upon that subject. Counsel for Murphy strenuously argue, in substance, that this conclusion can be reached only by the aid of evidence tending to show failure to complete the work according to the plans and specifications. This question they insist is of such nature as to involve rights common to all owners of property in the district, which became finally adjudicated against all such owners by the mandamus judgment against the city commission. There may be a sense in which this is true, but in so far as evidence of want of proper completion of the contract lends support to the contention of Summersett *et al.*, that *their lots and tracts* were not benefited by the improvement, we are of the opinion that they were entitled to produce evidence of such fact. The real issue is the amount of benefits resulting to the several lots and tracts of Summersett *et al.* Upon this issue they were not foreclosed, nor were they foreclosed upon any question of fact relevant to this issue. If the question of benefits were not here involved, the force of the mandamus judgment as against Summersett *et al.* might possibly be as claimed by counsel for Murphy.

We cannot escape the conclusion that the trial court properly disposed of the rights of the parties by its judgment setting aside and canceling the assessments against the property of Summersett *et al.*, the objectors, and that therefore the judgment must be affirmed. It is so ordered.

We do not desire to be understood as expressing any opinion in derogation of any right which may accrue in the future in favor of the city to make, or on the part of Murphy to have made, a reassessment to pay the cost of constructing

this improvement, in the event it is ultimately constructed by Murphy so as to result in such benefits as will support an assessment against the property of Summersett *et al.*, or ultimately completed by the city so as to result in such benefits as will support an assessment against the property of Summersett *et al.* within the rule announced by us in *Mallory v. Olympia*, 83 Wash. 499, 145 Pac. 627, where the city received the benefit of an uncompleted contract and thereafter made the work conform to its needs. We simply hold that the particular property of Summersett *et al.*, not being benefited in any degree by the improvement in its present condition, is not at this time subject to assessment, whatever the liability of such property may be in the future. We construe the judgment of the superior court as meaning no more than this. Indeed it may well be doubted that the superior court had jurisdiction to do more than this.

We also desire to be understood as expressing no opinion touching the possible right of Murphy to recover damages against the city arising from its fault, if any, resulting in its inability to make an assessment to pay for the improvement.

MORRIS, C. J., HOLCOMB, MOUNT, MAIN, ELLIS, and CROW, JJ., concur.

[No. 11927. Department One. March 31, 1915.]

Irl T. Replogle, *Respondent*, v. Seattle School District No. 1, *Appellant*.[1]

Master and Servant—Injuries to Servant—Workmen's Compensation Act—Civil Action. A person whose usual or regular employment, that of a truck driver and storekeeper's helper, was not extra-hazardous, but whose duty it was when called upon, to assist and work under the direction of an electrician in the installation of electric motors, classed as an extra-hazardous employment in the workmen's compensation act (3 Rem. & Bal. Code, § 6604-4), is subject to the provisions of that act, while engaged in such extra-hazardous work; and hence cannot maintain an action for personal injuries, against his employer who had fully complied with the act, in view of Id., § 6604-1, withdrawing all phases of the subject from private controversy, and abolishing all civil causes of action for personal injuries sustained in extra-hazardous employment, where the employer had complied with the act.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered September 10, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee assisting in installing an electric motor. Reversed.

Henry W. Pennock, for appellant.

Vanderveer & Cummings and *H. McC. Billingsley*, for respondent.

Crow, J.—Action by Irl T. Replogle against Seattle School District No. 1, for damages for personal injuries, and for services rendered. From a judgment in plaintiff's favor, the defendant has appealed.

There are two causes of action. Appellant concedes, however, that respondent is entitled to recover $43.20, the amount claimed on the second cause of action for services rendered, and it need not be further considered.

The question involved on this appeal affects the first cause of action only. The complaint, in substance, alleges, that

[1]Reported in 147 Pac. 196.

appellant is a duly organized school district; that on December 27, 1911, respondent was in its employ as a truck driver and storekeeper's helper, working under the direction and control of one J. M. Moseley; that in the due and regular course of his employment, Moseley directed respondent to accompany appellant's electrician, one Osborn, to a certain school building in the district, and there, under Osborn's direction, assist him in repairing one of appellant's electric motors; that while holding a lantern under the direction of Osborn, the latter negligently and carelessly caused the motor to revolve rapidly before a protecting sleeve had been placed in position; that thereby a clutch pully was caused to break, and that a portion of it struck and injured respondent.

Answering this cause of action, appellant, for an affirmative defense, with other facts, alleged that respondent's usual occupation as truck driver and storekeeper's helper was not at the time, and is not now, classed as extra-hazardous under the law and ruling of the industrial insurance commission of this state, but that the installation of an electric motor was and is extra-hazardous under the law and under the rulings of the commission; that shortly after October 1, 1911, appellant furnished the industrial insurance commission a complete list of all its employees, including respondent, who were engaged in manual occupations; that the commission thereafter classified appellant's employees and fixed the amount of premiums to be paid on their account; that appellant paid all premiums required by the commission, and that it was not, at the time of the accident, nor has it ever been, in default for any premium demanded by the commission.

On the trial of the action, it was, in substance, stipulated that plaintiff was employed as a truck driver and storekeeper's helper under the immediate direction and control of Moseley; that Osborn was employed and known as the electrician; that he had full charge of all electrical work for appellant, receiving orders from the chief engineer; that it

was a part of respondent's duty to deliver supplies, including electric motors, for use in the various school buildings; that it had been the custom to require respondent to assist other employees of appellant; that on several occasions respondent had assisted Osborn in the installation of electric motors in school buildings; that a ten-horse electric motor used for driving the fan in one of the buildings had become out of repair; that the electrician had taken it apart and had taken the main driving shaft, with windings and appurtenances, to a local machine shop in the city of Seattle for necessary repairs; that on December 27, 1911, respondent, in the regular course of his employment, was directed by Moseley to call at the machine shop for the parts of the motor which had been repaired, and convey the same, accompanied by Osborn, to the John B. Allen school, there to assist in assembling the parts and installing the motor under Osborn's direction and control; that, in compliance with such orders, respondent, accompanied by Osborn, delivered the parts of the motor at the school building, and there assisted Osborn in reconstructing and installing the motor, his duties being to assist in carrying the parts which had been repaired to the fan room and to hold a lantern for Osborn while he was replacing the various parts and installing the motor; that, while respondent was so engaged, Osborn, after making certain electrical connections with the motor, turned on the current, as a result of which the motor started and was caused to revolve at great speed; that a portion of the motor known as the "extension band" was at the time unprotected by the covering which should have been placed over it before turning on the current; that, as a result of the rapid revolutions, the unprotected band expanded and broke, a portion thereof striking respondent in the face and causing serious injuries, and that Osborn negligently turned on the current while the band was uncovered. The secretary of appellant's board of directors testified that, during the years 1911 and 1912, he was secretary of the board, and that the district had promptly

paid all claims that the industrial insurance commission of the state had made for premiums on workmen employed by the district, and that the district was not in default for any payments.

The question raised by the assignments of error is whether the workmen's compensation act, ch. 74, p. 345, Laws of 1911, 3 Rem. & Bal. Code, § 6604-1 *et seq.*, deprived the state courts of jurisdiction over respondent's first cause of action. Appellant contends that it did. In *Acres v. Frederick & Nelson*, 79 Wash. 402, 140 Pac. 370, this court, in an action for personal injuries prosecuted by a servant against his master, held that it was the duty of the latter to plead and prove a compliance with the industrial insurance act as a condition precedent to making the objection that the industrial insurance law had withdrawn the action from the courts. Appellant has complied with this requirement. The trial court was of the opinion that respondent's regular employment as truck driver and storekeeper's helper was not extra-hazardous, and that he was not entitled to compensation under the industrial insurance act.

It may be conceded that respondent's usual or regular employment as truck driver and storekeeper's helper was not extra-hazardous. It is not so classified in the law. But it must be remembered that respondent was an employee of appellant; that he was subject to the supervision, direction and control of Moseley; that he was required to obey, and did obey, Moseley's orders; that Moseley directed him to assist Osborn, the electrician, in the installation of the electric motor; that he did so, and that while so occupied he was subject to Osborn's orders. It is conceded that the installation of the electric motor was an extra-hazardous employment. Respondent was engaged in such employment at the time of the accident. He was not a volunteer, neither was he an interloper. It was his duty to assist in the extra-hazardous work, and the question is whether these facts and circumstances bring him within the operation of the industrial insurance

act. In § 1 of the act, 3 Rem. & Bal. Code, § 6604-1, we find the following language:

"The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents is hereby provided regardless of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Looking to § 4 (Id., § 6604-4) under the title "Construction Work" therein, we find that the installation of dynamos is extra-hazardous, as is the installation of machinery not otherwise specified. Commenting on § 1 of the act, this court, in *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, said:

"We can conceive of no language the legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the first section of the act. To say, with appellant, that the intent of the act is limited to the abolishment of negligence as a ground of action against an employee only, is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law—that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens. The employer and employee as distinctive producing causes are lost sight of in the greater vision that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enter into that production, recognizing no distinction between the injury and destruction of machinery and the injury and destruction of men in so far as each is a proper charge against the cost of production. The legislature in this act was dealing, not so much with causes of action and remedies, as with this great economic principle that has obtained recognition in these later years, and it sought, in the use of language it deemed apt, to em-

body this principle into law. That in so doing the legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of § 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and 'such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.' . . . For these reasons, we are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing except as they are saved by the provisos of the act are done away with."

It would seem that the doctrine thus announced is controlling in this action. Had the respondent voluntarily assisted the electrician in the installation of the motor, or had his act in rendering such assistance been without the scope of his usual employment, a different question would be presented. But it is apparent that, at the time of his injury, he was properly and lawfully engaged in extra-hazardous employment in obedience to commands and orders issued to him by those who were in lawful authority over him, and that it was his duty to be employed as he was then employed. This being the fact, it is apparent that, under the policy of the entire act, any claim he has for injuries by reason of the accident which occurred when he was engaged in such extra-hazardous employment, has been withdrawn from the jurisdiction of the courts and comes within the industrial insurance act.

Section 8 (Id., § 6604-8) of the act provides that, if any employer shall default in any payment to the accident fund, he shall not, if the default be after demand for payment, be entitled to the benefits of the act, but shall be liable to suit by the injured workman as he would have been prior to the passage of the act. The section further provides, that, in case the recovery actually collected in such a suit shall be

less than compensation would be under the act, the accident fund shall contribute the amount of the deficiency; that the person so entitled under the provisions of this act shall have the choice of proceeding by suit or taking under the act, but that, if he shall take under the act, his cause of action against the employer shall be assigned to the state for the benefit of the accident fund. This section, construed with § 1 and other portions of the act, clearly indicates the legislative intention that all claims for compensation for injuries incurred by employees in extra-hazardous work shall be withdrawn from the jurisdiction of the courts, with the exception that any employer, who after demand may be in default for payments to the accident fund, shall, at the election of the injured employee, be liable to an action for damages. Appellant was at no time in default, and respondent had no option to proceed against appellant. His only remedy was under the act. It therefore is apparent that the judgment will have to be reversed. In view, however, of the fact that the appellant concedes the sum of $43.20 is due the respondent for services rendered, the action will not be dismissed, but the cause will be remanded with instructions to enter judgment in respondent's favor for $43.20, with interest from January 20, 1912, and costs in the lower court. Appellant will recover its costs in this court.

Chadwick, Ellis, and Main, JJ., concur.

[No. 12074. Department Two. March 31, 1915.]

T. E. Hoxsey, *Respondent*, v. Lyda Murray *et al.*, *Appellants*.[1]

Appeal—Review—Verdict. The verdict of a jury upon directly conflicting evidence upon the only question at issue is conclusive on appeal.

Appeal—Review—Discretion—New Trial. A ruling on motion for a new trial for newly discovered evidence will not be disturbed except for abuse of discretion.

New Trial—Grounds—Newly Discovered Evidence—Diligence—Probable Result. Where the principal issue was as to whether the plaintiff, a physician, was authorized to perform an operation for removal of the Fallopian tubes and ovaries, defendant claiming that he was only authorized to remove the appendix, a new trial for newly discovered evidence showing that, after the trial, defendant had an operation to prove that the appendix had been removed, is properly refused for want of diligence, where, early in the trial, lasting several days, the plaintiff testified that he had not removed the appendix, and the defendant then offered to have the operation performed, but no operation was performed at that time and no continuance was asked, and the case was submitted on the evidence; especially where it is not satisfactorily shown that the new evidence would or ought to produce a different result.

Physicians and Surgeons—Actions for Services—Issues—Evidence—Admissibility. In an action to recover for the services of a physician in the removal of the Fallopian tubes and the ovaries, made necessary, according to plaintiff's testimony, by a diseased condition of those organs caused by the defendant's attempt to produce an abortion upon herself by the use of a catheter, evidence of statements made by the defendant to the plaintiff and others that she used a catheter upon herself for that purpose is admissible upon an issue as to whether the operation was necessary or was authorized by the defendant.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered November 11, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for services rendered by a physician. Affirmed.

[1]Reported in 147 Pac. 205.

Nuzum, Clark & Nuzum (*George H. Armitage*, of counsel), for appellants.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for respondent.

MAIN, J.—The purpose of this action was to recover for professional services as a physician and surgeon rendered to Lyda Murray. The defendants, F. J. Murray and Lyda Murray, are husband and wife. In the bill of particulars annexed to the amended complaint, the account is itemized. Two items of this account are for operations performed upon Mrs. Murray: One operation, described as "curretting," performed on January 26, 1911, and the other as "laparotomy," performed on February 16, 1911. The defendants answered the amended complaint by certain admissions and denials, and by a cross-complaint. In the cross-complaint, it is charged that the plaintiff was employed on February 16 to operate upon Mrs. Murray for appendicitis, and for no other or different purpose; that the plaintiff, without authority, operated upon Mrs. Murray removing her ovaries and Fallopian tubes; that the operation was not necessary and not justified by her condition. The damages alleged to have resulted from this claimed unauthorized operation are then set forth. The plaintiff replied to the cross-complaint, denying the material allegations thereof, and affirmatively pleading that each and every service performed was at the instance and request and with the full knowledge and consent of both of the defendants.

After the issues were thus framed, in due time the cause came on for trial before the court and a jury, and a verdict was returned in favor of the plaintiff. A motion for a new trial being made and overruled, the defendants appeal.

The primary issue in this case as tried in the superior court was whether the operation performed on February 16th was authorized. There is no claim that the charge made for the services is unreasonable if the operation was author-

ized, or was reasonably necessary, taking into consideration the condition of the patient.

The evidence introduced by the plaintiff, if true, shows, that the operation described as "curretting" was made necessary by the attempt on the part of Mrs. Murray to perform an abortion upon herself by the use of a catheter; that Mrs. Murray admitted to the plaintiff, and to a number of other witnesses who testified, that she used the catheter for the purpose mentioned; that the Fallopian tubes and ovaries had become diseased on account of infection from the decaying foetus, or from an infection carried into the womb by the catheter; that, before the laparotomy operation was performed, Mrs. Murray was told that she would probably lose both Fallopian tubes; that it could not be told until after the incision was made just what was necessary to be done; that Mrs. Murray told the doctors present for the purpose of performing the operation to go ahead and remove everything that was diseased and to do everything that they thought best for her; that a median incision was made just below the navel; that when the Fallopian tubes and ovaries were examined, it was found that both tubes contained pus, and that the ovaries were diseased; that the husband was then called into the room and advised that, if the ovaries were not removed, they would give Mrs. Murray constant trouble, and that he told the doctors at this time to remove whatever was necessary; that the incision was not made at the place where it is ordinarily made in cases of operations for appendicitis; that the incision, when the operation is for the purpose of removing the appendix, is usually made at a place known in surgery as "McBurney's point," which is a point about half way between the navel and the hip bone on the right side; that no mention was made at any time by Mrs. Murray or by any of the doctors relative to the removal of the appendix; and that Mrs. Murray was told of the operation that had been performed upon her three or four days thereafter, and she then expressed her satisfaction

and approval thereof. The plaintiff and the two doctors who assisted him in the operation testified that the appendix had not been removed.

The evidence introduced on behalf of the defendants, if true, shows that the plaintiff was employed to remove the appendix, and for no other purpose; that Mrs. Murray had at no time used a catheter for the purpose of performing an abortion upon herself, but that the miscarriage was brought about by another cause.

It will thus be seen that the question at issue in the trial court was plainly one of fact and, consequently, within the province of the jury to determine. Unless the trial court committed errors of law, the judgment must be affirmed. Other facts will be stated and further reference to the evidence will be made in connection with the consideration of the points to which such facts or evidence may be particularly pertinent.

There are two questions in this case for this court to determine. Stated in the inverse order from that in which they appear in the appellant's brief, they are: First, did the trial court err in declining to grant a new trial on the ground of newly discovered evidence; and second, was it error for the trial court to admit the evidence relative to the use of a catheter by Mrs. Murray?

I. As already stated, the amended complaint in this case described the operation as "laparotomy," which means abdominal. No motion was made to make this amended complaint more definite and certain by setting out specifically just what was done at this operation. In the cross-complaint, it was claimed that the operation removing the ovaries and Fallopian tubes was unauthorized and unnecessary. The reply to this cross-complaint claims that the service performed was authorized. The trial of the cause began on September 12, 1913, and the taking of testimony was concluded during the afternoon of the 17th of the same month. During the first day of the trial, the plaintiff testified as to

the removal of the Fallopian tubes and the ovaries, and denied that the appendix had been removed by himself and associates when the operation of February 16th was performed. On the 16th, and while the case of the defendant was being presented, the following occurred: During the retirement of the jury, counsel for the plaintiff moved the court to appoint a commission of three physicians to examine Mrs. Murray as to her physical condition. Thereupon counsel for the defendants said that he would tender Mrs. Murray to two doctors and Doctor Windell for an examination as to whether her appendix had been removed, stating that he was very sure it had; and that he had been authorized to make this tender of her for an operation to determine this fact. Counsel for the plaintiff replied that he would have nothing to do with the matter; that if the defendants' counsel wanted the operation, he could have it performed. Subsequently during the same day while Mrs. Murray was upon the witness stand, she was asked by her counsel whether she was willing to submit her body to an operation to determine whether the appendix had been removed, and she replied that she was. Later during the afternoon of this day, the trial was adjourned until the following morning in order that the commission of physicians appointed by the court might examine Mrs. Murray. The court declined to direct the commission to perform the operation. The plaintiff refused to have anything to do with the matter of an operation. The defendants did not have it performed. A verdict for the plaintiff was returned on the 18th day of September, 1913. A motion for new trial was made on September 20, 1913.

In support of the motion for a new trial, the defendants' counsel made an affidavit that on the 24th day of September, 1913, he advised counsel for the plaintiff over the telephone that Mrs. Murray had employed Dr. Windell to perform an operation upon her upon the following morning to ascertain whether her appendix had been removed, and that three other

doctors would assist in the operation, naming them; that if counsel for the plaintiff desired, Dr. Hoxsey, or any representative of his, might be present at the operation; that plaintiff's counsel replied that he did not believe they would care to have a physician present, or take any part in the operation. According to the affidavits of the physicians who were present at the operation, it was performed on September 25, 1913. All four of these doctors in their affidavits state that they found but one surgical wound upon the abdomen of Mrs. Murray at the time of this operation. Two of the doctors state that the appendix "had been removed some time previously by a surgical operation." Two of the doctors do not say in their affidavits that the appendix had been removed by a surgical operation, but state: "We found that there was no appendix there." Mrs. Murray in her affidavit states that but one abdominal operation had been performed upon her prior to the trial of the cause.

In resisting the motion for a new trial, the plaintiff answered the affidavits of the defendants by filing the affidavits of five or six physicians, all of whom in their affidavits state that it is impossible to determine from the scar or surgical wound found upon the body of any person whether or not more than one operation had been performed upon that person's abdomen; that frequently a second operation is performed by opening the abdomen at the same point where the scar or surgical wound of the first or former operation is, removing the scar, and sewing the wound; that thereupon the same heals so that it is impossible to determine whether one or more operations have been performed; that the appendix of Mrs. Murray may have sloughed off as a result of suppurative inflammation, leaving a scar similar to that which is left when the appendix is removed by surgery; and that it would be impossible to determine from the appearance thereof whether it had been removed by an operation, or by reason of sloughing off.

The defendants claim by their affidavits they have made a showing of newly discovered evidence which entitled them to a new trial. The granting of a new trial upon the ground of newly discovered evidence is a matter largely within the discretion of the trial judge. Before the appellate court will substitute its judgment for that of the judge presiding at the trial, it must appear with reasonable certainty that such discretion has been abused to the prejudice of the appellant. In *Coffer v. Erickson*, 61 Wash. 559, 112 Pac. 648, upon this question it was said:

"The granting of a new trial on the ground of newly discovered evidence is a question necessarily so largely in the discretion of the trial judge that it must appear with reasonable certainty that such discretion has been abused to the prejudice of the appellant, before the appellate court will substitute its judgment for that of the presiding judge, who has observed the proceeding throughout the trial."

It is a well known rule that evidence which could have been produced upon the trial by the exercise of reasonable diligence does not constitute newly discovered evidence. In this case, as appears from the facts stated, during the trial the defendants claimed the fact to be that the appendix had been removed from the body of Mrs. Murray, and her body was tendered for the purpose of having an operation performed to determine that fact. The trial court rightly declined to direct the commission appointed by him to perform the operation, because of lack of power. The plaintiff refused to have anything to do with the matter of the operation. The defendants did not have it performed. Neither did they claim surprise, nor ask for a continuance until an operation could be performed and the fact determined. It will hardly be claimed by the defendants that, in tendering Mrs. Murray for the operation, they were suggesting to the plaintiff that he do an unreasonable thing. If it were a reasonable and proper thing to tender Mrs. Murray for the operation, it would be equally reasonable that the defendants, claiming

that the appendix had been removed, should ask for a continuance of the trial in order that they might determine such fact. Early in the trial, which lasted some days, the defendants were informed by the testimony of the plaintiff that he had not removed the appendix. If the defendants desired to secure evidence as to what the fact was by means of an operation, they could then have asked for a continuance until such operation could be performed and the fact ascertained. This they did not do, but continued with the trial and, after the verdict went against them, proceeded to ascertain the fact which they claimed during the trial did exist. The law does not look with favor upon submitting a case to a jury upon one set of facts and, in the event of an adverse verdict, obtain a new trial upon another state of facts which were known at the time of the submission, or by the exercise of reasonable diligence could have been known. In *Coffer v. Erickson*, *supra*, the appellant claimed the right of a new trial upon the ground of newly discovered evidence. It was there said:

"After having knowledge of the facts complained of, the appellant offered his testimony and, at the close thereof, formally rested his case. He should not be permitted to submit his case on one set of facts and, if a verdict is found against him, obtain another trial on another set of facts which were known to him at the time of such submission. Such has been the uniform holding of this court where no continuance was asked for."

Before a new trial is granted on the ground of newly discovered evidence, it ought to be satisfactorily shown, not that the evidence might possibly produce a different result, but that it would, or ought to do so, if the jury yielded to its legitimate influence. *McKilver v. Manchester*, 1 Wash. T. 255; *Binns v. Emery*, 45 Wash. 215, 88 Pac. 133; *In re Wells*, 60 Wash. 518, 111 Pac. 778; *Hardman Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059; *Knapp v. Chehalis*, 65 Wash. 350, 118 Pac. 211.

After a careful review of the evidence in this case, as well as an attentive consideration of all of the affidavits filed in support of the motion for new trial, we are not constrained to believe that, if a new trial were granted and evidence was offered as covered by the affidavits of both parties upon the motion for a new trial, it would, or ought, to produce a different result. The appellants cite a number of cases from other jurisdictions which they claim support their contention that the evidence in question is newly discovered. All of these authorities have been carefully read, and are plainly distinguishable upon the facts from the present case. The two cases most nearly in point, one from the supreme court of the state of Kansas, and the other from the Kentucky court of appeals, will here be reviewed:

In *Bousman v. City of Stafford*, 71 Kan. 648, 81 Pac. 184, the plaintiff brought suit against the defendant for damages for injuries received in a fall caused by a defective sidewalk. The injuries sustained were claimed to be internal. The defense was that the plaintiff was not injured. The trial occurred on May 27, 1903, and a verdict was returned for the defendant. Thereafter a motion for a new trial was interposed. On August 12, 1903, the plaintiff was operated upon by a surgeon who, upon opening the abdomen, found that as a result of the injury an intestine had been ruptured, and an abcess had formed from which various complications had ensued. The purpose of the operation appears to have been, not for the purpose of discovering testimony, but for the purpose of relieving the plaintiff from a condition of distress which he suffered. It was there held that the facts disclosed by the operation came within the rule of newly discovered evidence.

In *Anshutz v. Louisville R. Co.*, 152 Ky. 741, 154 S. W. 13, a young married woman was injured while a passenger on one of the cars of the Louisville Railway Company. The accident occurred during the month of April, 1910. At the time of the injury, she was enceinte, and thereafter on the

6th day of September, 1910, there was born to her a baby. In April, 1911, the plaintiff had undergone a serious operation, at which time it was shown, by several physicians and surgeons who were present, that there were removed from her body both Fallopian tubes and the whole of the left ovary and a part of the right. The cause was tried in December, 1911. On the trial, the physicians and surgeons who were present at the operation in April, 1911, testified with reference to the nature of the operation, and in addition that, by reason thereof, the plaintiff was barren and could never have another child. This was one of the chief elements of damage claimed. They further stated, at the time of the trial, that there had developed a tumor in the abdomen of the plaintiff which sooner or later would necessitate another operation. On June 8, 1912, the plaintiff gave birth to another baby. Thereupon, in accordance with the statute of the state of Kentucky, the railway company filed a petition for a new trial on the ground of newly discovered evidence. The Kentucky court of appeals held that the evidence as to the birth of the second child was newly discovered, and granted a new trial because it was a material matter so far as the amount of damages was concerned.

In neither of the cases just referred to was it claimed upon the trial, either that an operation was a reasonable or proper method for the purpose of ascertaining the fact in the one case as to whether the plaintiff was internally injured, or in the other for determining whether the plaintiff was afflicted with the growth of a tumor. In the Kansas case, the operation seems to have been performed in the ordinary course of affairs for the purpose of relieving a painful condition. In the Kentucky case, the newly discovered evidence was the product of the operations of nature. We think neither of those cases reach the question here presented. As already stated, in this case the defendants, upon the trial, claimed the fact to be the same as their affidavits in the motion for a new trial showed. They desired the plaintiff,

against whom this fact would militate, if it were true, to perform the operation and produce the evidence. They there recognized by their conduct and tender that an operation performed for the purpose of ascertaining the fact in question would not be unreasonable. Had the question not been raised upon the trial in any form, and subsequently, in the ordinary course of affairs, an operation had been performed, and the fact disclosed while the motion for a new trial was pending, a different question would be presented, and one more closely analogous to the situation in the two cases mentioned. In addition to this, the principal contention in the case now before us was whether the operation for the removal of the Fallopian tubes and the ovaries had been authorized. The facts shown by the affidavits in support of the motion for a new trial would, on the one hand, contradict the doctors wherein they testified that they had not removed the appendix, and on the other, corroborate the defendants in their claim that the plaintiff was employed for the purpose of removing the appendix. It would not tend to corroborate the defendants that the operation removing the Fallopian tubes and the ovaries was unauthorized or unnecessary. In both of the cases above referred to, the newly discovered evidence bore upon a major issue in the controversy. In the one case, it disproved the testimony offered on the trial that the plaintiff was not injured. In the other, it disproved the testimony offered on the trial that the plaintiff in that case was barren.

In *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233, it was said:

"What we have said disposes of all of the grounds of the motion for a new trial save the claim of newly discovered evidence. The affidavits in support of the motion indicate that the new evidence would be merely of an impeaching and cumulative character, and not of a nature reasonably calculated to change the result. The refusal to grant a new trial upon an offer to produce new evidence impeaching or going to the credibility of the opposing party is no abuse of discretion."

Upon this branch of the case we conclude that the trial court, in denying the motion for a new trial on the ground of newly discovered evidence, did not abuse its discretion.

II. The defendants claim that it was error for the trial court to permit any evidence to be introduced relative to the fact that Mrs. Murray had told the plaintiff, and other witnesses who testified, that she had used the catheter in attempting to perform an abortion. When the plaintiff was on the witness stand, he was asked by his counsel to state when he first met Mrs. Murray, and to detail what was said, and the condition in which she was at that time, and what was done. In answer to this question, among other things, the plaintiff testified that Mrs. Murray told him that she had used a catheter on herself for the purpose of getting rid of her offspring, and further, that he phoned a prescription to a drug store which was to be delivered to her. The witness was then asked, "What was that prescription?" And he answered the question. Thereupon counsel for the defendants objected on the ground that what the prescription contained was immaterial, and that any testimony with reference to her condition would be immaterial unless the intention was to "establish by it that the condition of the ovaries was brought on by this attempted abortion by herself." In response, counsel for the plaintiff stated, "That is the only thing I want to show," and continued by saying that the condition of Mrs. Murray was material in any event. Subsequently, when further testimony was offered as to the statements of Mrs. Murray relative to having used the catheter, a somewhat broader objection was interposed.

In the first objection, counsel seem to recognize that, if the testimony was for the purpose of showing that the condition of the ovaries was brought about by the attempted abortion, the testimony was material and relevant. The plaintiff claims that the objection does not save the question. It will be assumed, however, but not decided, that the objection is sufficient to raise the question as to the competency

of the testimony offered. The plaintiff claims and the testimony on his behalf shows, that the first operation, that of curretting, was brought about on account of the use of the catheter in an attempt at abortion; that, by the catheter, infection could be carried into the womb, and thereby produce the result found in the Fallopian tubes and the ovaries. And it is claimed, in support of the competency of the testimony, that, if the catheter was used and the diseased condition of the parts removed was due to this infection, or to an infection coming from a decaying foetus, the evidence would be competent and material as bearing upon the question whether the operation performed was authorized or necessary. The diagnosis as to what operation would be necessary must, of course, have been based in part upon the statements made by the patient. If the catheter was used as claimed, and was responsible for the infection which necessitated the removal of the tubes and the ovaries, the testimony as to the use of the catheter would be competent as bearing upon the operation which the respondent was authorized to perform, or as to what was reasonably necessary.

The judgment will be affirmed.

ELLIS, MOUNT, CROW, and FULLERTON, JJ., concur.

[No. 12390. Department One. March 31, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. J. A. HANES, *Appellant*.[1]

PROSTITUTION — DEFENSES — STATUTE. Under Rem. & Bal. Code, § 2440, providing that every person who shall place a female in a house of prostitution, with intent that she shall live the life of a prostitute, shall be punished, etc., it is no defense that the female was a prostitute.

SAME—KNOWLEDGE OF DEFENDANT — EVIDENCE — SUFFICIENCY. A conviction for placing a female in a house of prostitution with intent that she live the life of a prostitute is sustained by proof that defendant was keeper of a livery stable where he had rooms and consorted with the woman, that she plied her trade at will, and there was evidence warranting the jury in finding that he knew she was practicing prostitution for money and gave him part of her earnings, although he denied such knowledge.

PROSTITUTION—"PLACE"—STATUTE — CONSTRUCTION. Under Rem. & Bal. Code, § 2440, making it a felony to "place" a female in a house of prostitution with intent that she shall live the life of a prostitute, it is proper to refuse an instruction that the word "place" implies a moral or physical restraint or force; the term meaning merely the furnishing of a place or opportunity.

CRIMINAL LAW—TRIAL—FAILURE TO INSTRUCT. Rem. & Bal. Code, § 2148, making it the duty of the court to instruct that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf, is mandatory, and failure to do so is reversible error.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered April 6, 1914, upon a trial and conviction of placing a female in a house of prostitution. Reversed.

R. M. Dye, for appellant.

James S. Freece and *C. A. Pettijohn*, for respondent.

CHADWICK, J.—Appellant was charged with the crime of placing a female in a house of prostitution, with intent that such female should live a life of prostitution. Rem. & Bal.

[1]Reported in 147 Pac. 193.

Code, § 2440 (P. C. 135 § 375). He was convicted, and brings his case here, alleging a number of errors.

It is first contended that, whereas, the proof shows that the woman was in fact a prostitute, there could be no crime. Whatever may be the rule elsewhere, we think our statute is sufficiently broad in terms to include a case of this kind. It is said:

"Every person who shall place a female . . . in a house of prostitution, with intent that she shall live a life of prostitution, etc., shall be punished etc."

Statutes are not uncommon which provide that a person shall be guilty of a crime if he places a female in a public resort for the purpose of leading her into a life of prostitution. It is upon such statutes and authority and cases following them that appellant rests his contention. Under our statute it is no defense to show that the woman was of unchaste character.

It is further contended that the proof is not sufficient to show that the place mentioned is a place of prostitution. Appellant was the keeper of a livery stable, where he had a room or rooms. It is not denied that the woman consorted with him and was at least a loiterer about his place. He insists that he had no knowledge of any other acts of prostitution committed by her, although it seems to be established by competent evidence that she plied her trade at will. We think there is testimony sufficient to sustain the findings of the jury that appellant did in fact know that the woman was practicing prostitution for money and that she gave appellant a part of her earnings. It was for the jury to say whether appellant's contention that the money was given him in payment of a debt was a truthful statement, considering all of the other facts and circumstances in the case, including his knowledge of her character.

Appellant requested the following instruction:

"The word 'place,' as used in the information in this case, means 'to fix, to locate, to settle,' and before you can find

the defendant guilty as charged in the information, you must find from the evidence beyond a reasonable doubt, that the defendant J. A. Hanes, by some affirmative action or conduct on his part, amounting to at least moral restraint, caused Annie Sockenticken to enter his place of residence or livery barn with the intent that the said Annie Sockenticken should live thereafter a life of prostitution. And in this connection you are instructed that a common prostitute is a woman who offers her body to indiscriminate intercourse with men."

Appellant contends that the word "place" has a meaning more extended than a mere invitation to remain at a place; that it implies a restraint, either physical or moral. The law has no such restricted meaning. The object of the statute is to suppress the practice of prostitution, and to place a female in a house of prostitution means the furnishing of a place and opportunity. The subdivision of the statute under which appellant is charged does not imply the element of force, either physical or moral.

It will be noticed that the statute, after defining the crime of which appellant is charged, continues: "or who shall compel any female to reside with him or with any other person for immoral purposes, or for the purposes of prostitution, or shall compel any such female to reside in a house of prostitution or to live a life of prostitution;" subdivision 1, Rem. & Bal. Code, § 2440. The statute is in the disjunctive. A person may be guilty of a crime if committed in any of the ways covered by the statute. Other errors are assigned. They do not go to the merits and are not likely to recur on a new trial.

Although the record is otherwise clear of error, the case must be reversed and remanded for a new trial. The court did not instruct the jury, as directed by the statute, Rem. & Bal. Code, § 2148 (P. C. 185 § 1145), wherein it is made the duty of the court to instruct that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf. It was held in *Linbeck v.*

State, 1 Wash. 336, 25 Pac. 452, and *State v. Myers*, 8 Wash. 177, 35 Pac. 580, that this statute is mandatory and that it is the duty of the trial judge to so instruct the jury; that a failure to do so is reversible error. An engaging and persuasive argument is made by the prosecuting attorney in which we are asked to overrule our former holdings. If the matter were an original question, we would be inclined to consider some of the reasons urged in support of his argument. The cases cited followed the letter of the statute, which says, "It shall be the duty." They have been followed in the following cases: *State v. Crotts*, 22 Wash. 245, 60 Pac. 403; *State v. Douette*, 31 Wash. 6, 71 Pac. 556; *State v. Bennett*, 71 Wash. 673, 129 Pac. 409.

The *Myers* case was decided in 1894. Eleven sessions of the legislature have convened since that time. If the statute was not intended by the legislature to bear the construction which the court put upon it, there has been ample opportunity to correct it. The legislature has not done so. We must presume, therefore, that the construction given the statute by the court has the sanction of the law-making body.

For the reason assigned, we reaffirm that holding and order the case remanded for a new trial.

MORRIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 12495. Department Two. March 31, 1915.]

UNION CENTRAL LIFE INSURANCE COMPANY, *Appellant*, v. LUTHER HAWKINS, *Respondent*.[1]

APPEAL — PRESERVATION OF GROUNDS — EXCEPTIONS TO FINDINGS — NECESSITY. Where a judgment denying the foreclosure of a mortgage was based upon affirmative findings of fact that the mortgage was a forgery, and not upon the insufficiency of plaintiff's evidence, exceptions to the findings are necessary to a review of the evidence on appeal.

SAME—REVIEW—FINDINGS—EXCEPTIONS—NECESSITY. In the absence of findings as to whether plaintiff in a mortgage foreclosure had an equitable lien for taxes paid, and of any exceptions to the findings on which the action was dismissed, the subject cannot be inquired into on appeal.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered September 20, 1913, upon findings in favor of the defendant, in an action to foreclose a mortgage, tried to the court. Affirmed.

Parker, Richards & Fontaine, for appellant.

Lynch & Chesterley (*O. L. Boose*, of counsel), for respondent.

MORRIS, C. J.—Action to foreclose a mortgage. The complaint alleged execution and delivery of the mortgage; payment of taxes on the mortgaged property by plaintiff by reason of defendant's failure to pay the same; default in the payment of interest and taxes due, and the election of plaintiff to declare the whole debt due and payable. Defendant answered, denying the execution or delivery of the mortgage, claiming it to be a forgery, and by cross-complaint asked that title to the property be quieted in him. The trial court made findings of fact and conclusions of law divided into two branches, the first being upon plaintiff's complaint, and the second upon defendant's cross-complaint. On the first branch, the court found the mortgage

[1]Reported in 147 Pac. 199.

was a forgery, and concluded that, because thereof, it should be cancelled and annulled and the land freed from any and all incumbrance thereof. Upon the second branch, the court made findings relative to the acts of the parties, and of certain third parties, from which it concluded that title to the mortgaged property was in defendant. Judgment was entered for defendant, and plaintiff appeals.

No exceptions were taken to the findings of fact and conclusions of law of the trial court, and for this reason respondent moves to strike the statement of facts and abstract. In contesting this motion, appellant contends that its complaint was in effect dismissed, and it is within the rule announced in *Murray v. Shoudy*, 13 Wash. 33, 42 Pac. 631, that, when a judgment of nonsuit has been ordered without the making of findings of fact, the facts are reviewable here without exceptions. This contention is untenable for the reason that the trial court specifically found the appellant's mortgage was a forgery and based its conclusion upon such fact, and not upon any insufficiency of fact to sustain the complaint. In other words, it was the strength of respondent's case, and not the weakness of appellant's, that induced the finding. Finding no exceptions in the record, respondent's motion must be sustained.

The only question remaining for our determination is, do the findings of fact support the decree? *Campion v. Kehoe*, 80 Wash. 627, 141 Pac. 1138; *Nichols v. Capen*, 79 Wash. 120, 139 Pac. 868; *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717. The findings make no reference to the payment of taxes. We cannot, therefore, inquire as to whether or not appellant is entitled to an equitable lien upon the property for the full amount of the taxes paid irrespective of the validity of the mortgage. Accepting the findings as correctly determining all the facts in the case, there can be no question as to their sufficiency to support the decree, and the judgment is affirmed.

Main, Ellis, and Crow, JJ., concur.

[No. 12574. Department Two. March 31, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY RUSSELL, *Appellant*.[1]

EMBEZZLEMENT — MISAPPROPRIATION BY AGENT — DEFENSES. Upon conviction of an agent of larceny by embezzlement under Rem. & Bal. Code, § 2601, upon evidence of the accused that he was intrusted with money to make a payment upon the purchase of a farm, with the express agreement that he was to have no compensation for his services, and that he paid only part of the money, appropriating the balance to his own use, the accused can claim no defense under Rem. & Bal. Code, § 2602, providing that "it shall not be larceny for any bailee, factor, pledgee, servant, attorney or agent . . . to retain his reasonable collection fee or charges;" the reasonable value of his services being wholly immaterial.

SAME—DEFENSES—INSTRUCTIONS. In such a case, an instruction is as favorable to the accused as his own evidence warranted, where the jury were told that it is a sufficient defense that the money was withheld or appropriated openly and avowedly, under a claim of right, proffered in good faith, honestly believing that he was legally entitled to it as his own.

Appeal from a judgment of the superior court for Stevens county, Blake, J., entered March 6, 1914, upon a trial and conviction of larceny. Affirmed.

Jesseph & Bourland, for appellant.

John B. Slater and *J. A. Rochford*, for respondent.

ELLIS, J.—The defendant was tried for the crime of larceny as defined by Rem. & Bal. Code, § 2601 (P. C. 135 § 695), upon an information charging:

"That on or about the 15th day of March, 1912, in the county of Stevens and state of Washington, the said defendant, Henry Russell, then and there being, and then and there having in his possession, and in his custody, and under his control, as agent, and trustee, for Margaret Theobald and A. Theobald, the sum of seven hundred and ninety-five dollars, in money and property of the said Margaret and A. Theobald, did then and there, with intent to deprive and de-

[1]Reported in 147 Pac. 194.

fraud the owners thereof, unlawfully and feloniously convert, withhold, and appropriate to his own use, the said sum of seven hundred ninety-five dollars, the same being lawful money of the United States of America and of the value of seven hundred and ninety-five dollars, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Washington."

The evidence presents no conflict. One Bresnahan owned a tract of land containing about two hundred acres near Colville, Stevens county, Washington, which he desired to sell for $22,000. One Hoy owned an adjoining tract. The prosecuting witnesses, Theobald and wife, were Hoy's brother-in-law and sister. They formerly owned and resided on a farm near Iowa City, in the state of Iowa. Hoy, hoping that they might be induced to purchase the Bresnahan land, had some conversation concerning it with Bresnahan, who told Hoy that if he could effect a sale, Bresnahan would be willing to pay him a commission of $500. No writing to that effect was ever made.

In the summer of 1911, Hoy became acquainted with the defendant, who so far as his business was disclosed, was an itinerant broker in mining stocks. In the fall of 1911, Hoy and his wife went on a visit to Iowa. For some unexplained reason, the defendant accompanied them, and on their arrival at Iowa City, went with Hoy to the Theobald farm and were introduced to the Theobalds. There is some evidence that, while on this journey, Hoy told the defendant that, if he would assist him in selling the Bresnahan land, they would divide the $500 commission. Theobald informed Hoy that he had sold his Iowa farm and contemplated moving to Texas. The family were averse to this, and Hoy sought to dissuade him, urging him to come to this state and buy the Bresnahan land, which he described to the Theobalds, either then or subsequently showing them photographs of the buildings. Finally, the Theobalds became interested and requested Hoy to negotiate the purchase of the land for them on his return

to Colville. This responsibility Hoy declined, advising that they make no purchase until they had visited Washington and examined the land. Hoy testified that, at this juncture, the defendant entered the conversation, saying:

"'I will do the business.' Mrs. Theobald says, 'If you do the business out there for us we will not pay you any commission, I want that understood.' He said, 'It shall not cost you a cent of commission. I will do that for you to get you out to Washington. That is what we want. We want your kind of people in Washington instead of some other people that we know.'"

Both Theobald and wife testified to this conversation in substantially the same words, and the defendant himself made no denial of this version of the transaction. He admitted that he never had any agreement or understanding with anybody for compensation, for expenses or commission. With this understanding, the Theobalds entrusted the defendant with $1,295 in drafts, which sum the defendant was to pay to Bresnahan on the purchase price of his land, which price Hoy had informed the Theobalds would be $22,000. There is no evidence that, up to this time, Bresnahan had ever talked with or even knew the defendant.

Late in December, 1911, the defendant returned to Colville and entered into a contract with Bresnahan for the purchase of the land for the Theobalds, but paid him only $500 on the purchase price. Bresnahan, subsequently learning that the defendant had received an additional $795 from the Theobalds to pay on the purchase price, asked the defendant for it. The defendant informed him that it was Theobald's money and that he intended to keep it until he learned whether Theobald would take the ranch or not; that, if he did not, he, the defendant, would purchase it himself. Hoy, Bresnahan and Theobald's son all testified to this conversation, and the defendant admitted its substance. On February 7, 1912, the defendant wrote to Theobald as follows:

"I have not [now] arranged to extend the contract to March 15th instead of March 1st, and Mr. Bresnahan puts deed, abstract and bills of sale for the personal property in the First National Bank. I have paid Mr. Bresnahan $500 and will pay him the balance when he completes his part of the contract, except $500, which he has promised to Mr. Hoy as commission. . . . You will understand that you have full credit on the purchase of this farm for $1,295."

In February or March, 1912, the exact date does not appear, the Theobalds came to Colville, and then learned that they had received credit for only $500 on the purchase price. The old contract for the purchase of the land was withdrawn from the bank and destroyed. Negotiations were reopened directly between Bresnahan and the Theobalds and finally a new contract on different terms was entered into and the Theobalds were placed in possession of the land. Meanwhile the defendant had disappeared. An information was filed against him, but he was not apprehended until September, 1913, when he was arrested at North Yakima. The trial resulted in a verdict of guilty as charged. From the judgment of conviction and sentence, he prosecutes this appeal.

It is claimed that the court erred, (1) in excluding evidence offered to show the reasonable value of services of real estate agents for negotiating sales of land; (2) in refusing to give a requested instruction to the effect that it is not larceny for an agent to retain his compensation from moneys entrusted to him by the principal, and that if the jury found that the appellant retained for his own use from the money entrusted to him by the Theobalds a sum for compensation for services rendered and that the sum retained was no more than a reasonable charge for such services, then the appellant was not guilty of larceny and the verdict must be in his favor.

These claims are directed to the same contention, namely, that the appellant was entitled to a commission, either from the Theobalds or from Bresnahan for bringing them together and negotiating the sale. This contention is wholly

lacking in evidential support. There was no evidence whatever that either of the Theobalds or Bresnahan ever at any time promised to pay the defendant any commission or compensation of any kind, much less that any such promise was made in writing so as to constitute an enforcible contract under the statute of frauds. On the contrary, the express agreement with the Theobalds was that he was to receive no compensation. The appellant's own testimony negatives his present claim. He testified that he received in all $1,295 from the Theobalds "to be used in the purchase of this land;" that he paid $500 to Bresnahan as a first payment on the purchase, and further, we quote from his own abstract:

"The $795 was to be paid to John Bresnahan on the contract. I never had any arrangement with the Theobalds that I was to receive from them any compensation for expenses or commission. I did not have any arrangement or understanding with anybody about it. I don't know whether I talked commission or compensation with Mr. Bresnahan or not at the time we made this contract."

And again:

"I paid Mr. Bresnahan that certificate of deposit for $500 on the contract. I had some conversation with Mr. Bresnahan afterwards near the First National Bank. He said he had learned I had some money I had not turned over to him, and I ought to pay to him. He said it was his money and insisted upon that. I didn't tell him I was claiming that money as compensation for my services in the disposition of the place. I told him I should retain that money until the contract was ratified and carried out on the part of the Theobalds. I don't remember that I ever told him that I was claiming compensation for any commission. I never was notified that the contract had been carried out. Nobody ever made a demand upon me for the money. . . . I was working for Mr. Bresnahan in the sale of this land. I finally retained this money for my expenses and my services in the making of the sale of this property."

This is the gist of the appellant's testimony.

The appellant bases his whole defense on the provisions of Rem. & Bal. Code, § 2602 (P. C. 135 §697), which reads as follows:

"It shall be no defense to a prosecution for larceny that the accused was entitled to a commission out of the money or property appropriated, as compensation for collecting or receiving the same for or on behalf of the owner thereof, or that the money or property appropriated was partly the property of another and partly the property of the accused; but that it shall not be larceny for any bailee, factor, pledgee, servant, attorney, agent, employee, or trustee, executor, administrator, guardian, officer or other person to retain his reasonable collection fee or charges."

Even assuming the fact, which the evidence not only fails to establish but clearly negatives, namely, that the appellant had a valid claim against Bresnahan for producing a purchaser of his land, the evidence presents no defense under the above quoted statute. The money was entrusted to the appellant by the Theobalds, as he himself admits, for a specific purpose, with the express understanding that he was to receive no compensation for his services. He did not collect this money for the Theobalds nor was he entitled to any collection fees or charges by reason of its coming into his possession. He did not collect it for Bresnahan. At the time he received it, he had never had any conversation with Bresnahan. At that time, the Theobalds owed Bresnahan nothing. The money was paid to him for the express and only purpose of making payment on the purchase price of the land in case such purchase could be negotiated. Even if he had had an enforcible contract with Bresnahan for a commission he would have had no claim on this money until it had been paid to Bresnahan or had been credited on the purchase price of the land. Until then it was, as he admitted, Theobald's money. The one dominant fact is undisputed. The appellant received this money from the Theobalds for a specific purpose and appropriated it to his own use. This, under the provisions of Rem. & Bal. Code, § 2601 (P. C.

135 § 695), constitutes larceny. What was the reasonable value of his services was a matter wholly immaterial in view of his own testimony. The offered evidence was properly excluded.

For the same reason, his requested instruction was properly refused. There is no predicate for such an instruction in the evidence. The court instructed the jury as follows:

"The laws of the state of Washington provide that in any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim is untenable. Therefore, if you find from the evidence that the defendant withheld or appropriated to his own use the property or money described in the information and that he did so openly and avowedly under a claim of title preferred in good faith, that is honestly, believing that he was legally entitled to it as his own, then your verdict should be not guilty."

This instruction was fully as favorable to the appellant as his own testimony warranted.

A review of the many authorities cited would be of no profit, since the undisputed evidence brings the appellant's conduct directly within the plain terms of the statutory definition of larceny and offers no palliation or excuse.

The judgment is affirmed.

Morris, C. J., Crow, Main, and Fullerton, JJ., concur.

[No. 12114. Department Two. April 5, 1915.]

GEORGE Z. WORDEN, *Respondent*, v. VELMA WORDEN, *Appellant*.[1]

DIVORCE — ALIMONY — MODIFICATION — CHANGE OF CONDITION. A change in the financial circumstances of a former husband, warranting a modification of a decree for monthly alimony, is sufficiently shown where it appears that, on granting the divorce, the property was divided, and since the divorce his income has not been sufficient to meet the monthly payments, and further payments cannot be made without sacrificing the property awarded to him in the decree.

DIVORCE—ALIMONY—REVOCATION OF ORDER. Where a decree of divorce awarded alimony to the wife "until the further order of the court," the order, being temporary in its nature, was subject to revocation at the discretion of the court.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered December 13, 1913, directing the discontinuance of alimony awarded by a decree of divorce, after a hearing before the court. Affirmed.

Thos. R. Waters and *Wm. J. Biggar*, for appellant.

Chas. A. Sather, for respondent.

FULLERTON, J.—The respondent and appellant were formerly husband and wife. They were divorced by a decree of the superior court of Whatcom county, entered on February 24, 1913. The decree partitioned the real property, which consisted of mere contracts of purchase, and the corporeal personal property of the parties, between them in apparently equal moieties; directed that the respondent pay to the appellant forthwith the sum of $214.50, as her share of an open account owing the parties by one Eunice A. Worden; the costs of the divorce proceeding, with $25 as attorney's fees to the appellant's counsel; and the sum of $15 per month as alimony for the use of the appellant until the further order of the court.

[1]Reported in 147 Pac. 403.

The respondent paid the fixed sums as ordered by the decree, borrowing the money for that purpose, and the installments of alimony until the month of November, 1913, when he instituted this proceeding, seeking to be relieved of any further payments on that account. Notice was given the appellant of the application and a hearing had thereon, at the conclusion of which the court, by a general order, granted the relief asked. From the order so entered, this appeal is prosecuted.

The order as entered by the court does not disclose the grounds upon which it was rested, but it is gathered from the proceedings occurring at the hearing that it was rested on two grounds, namely: misconduct on the part of the appellant of an immoral nature occurring since the entry of the decree, and a change in the financial circumstances of the respondent rendering him incapable of complying with the order.

As to the first ground stated, we agree with the appellant's counsel that the evidence does not justify a finding that the appellant has been guilty of immorality, and that the order cannot rest on that ground even though it be conceded that the appellant's conduct is now a matter of concern to her former husband. But we think it may rest on the latter ground. The evidence does not show the respondent's income at the time the divorce was granted, but does show that it has not been sufficient since that time to meet the obligations put upon him by the court in the decree, and that further payments by him of the monthly alimony cannot be made without a sacrifice of the property awarded him in the decree. It is argued by the appellant that this is not sufficient to show a change in the financial circumstances of the respondent. But we think it is, under the rule of *Mahncke v. Mahncke*, 43 Wash. 425, 86 Pac. 645. Here, as was the fact in that case, the evidence on which the original decree is based is not before us, and we must presume that it was founded on sufficient evidence. Since it appears

that the respondent is not now able to meet these payments, a presumption of change in circumstances of the respondent follows as of course. Moreover, the requirement for the payment of alimony was temporary at most. It was to be made only until the further order of the court, and, seemingly, was not made upon the basis of a just or reasonable division of the estate of the parties, but as an act of grace to the wife to continue until such time as she could accommodate herself to the changed conditions. The trial court therefore had power to revoke the order on application at his discretion, and we cannot think the discretion abused in this instance.

The order is affirmed.

CROW, ELLIS, MOUNT, and MAIN, JJ., concur.

[No. 12188. Department Two. April 5, 1915.]

SPOKANE MERCHANTS ASSOCIATION, *Respondent*, v. CLERE CLOTHING COMPANY, *Appellant*.[1]

CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE—EVIDENCE—SUFFICIENCY. Where a foreign mercantile corporation, being a creditor, purchased a bankrupt stock of goods from the trustee in bankruptcy and conducted the business of selling it off at retail through its sales agents, adding other goods to the stock from time to time, it was a foreign corporation doing business in this state; and it cannot be claimed that the goods were merely delivered to the retail agents for sale on consignment, where their only authority was to sell at retail and deposit the proceeds and the corporation financed the business, retained absolute control of the goods, and made no bill of sale or instrument to secure the alleged purchase price.

SAME—FOREIGN CORPORATIONS—PROCESS—SERVICE—PRESIDENT AS AGENT. Service of a summons on the president of a foreign corporation doing business in this state, while he was temporarily in the state looking after its interests, is authorized by Rem. & Bal. Code, § 226, subd. 9, providing that, in case of foreign corporations, service of summons may be made by delivery to "any agent, cashier or secretary thereof"; since the president was "an agent" of the corporation.

[1]Reported in 147 Pac. 414.

PRINCIPAL AND AGENT — SCOPE OF APPARENT AUTHORITY — STORE MANAGER. A sale of goods to the manager of a retail store for the purpose of replenishing its stock, is within the apparent scope of his authority; and where the retail store was but the *alter ego* of the defendant and its agent to dispose of the stock, the seller was justified in charging the account to defendant upon the manager's request.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 10, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Belden & Losey (*Henry R. Newton*, of counsel), for appellant.

J. D. Campbell and *J. B. Campbell*, for respondent.

ELLIS, J.—This is an action by the assignee to recover the balance due on an account for goods alleged to have been sold by the Spokane Dry Goods Company to the defendant.

The defendant is a New York corporation, engaged in the wholesale clothing business, with its principal, and as it claims, only, place of business at Syracuse, New York. T. H. Clere was its president and Thomas K. Smith its secretary. In its answer it denied that it purchased the goods or that it made payments on the account.

The defendant, appearing specially, moved to quash the service of summons on the grounds that the defendant is a foreign corporation, that it has never had an officer or agent residing in the state upon whom process might be served, and that on July 7, 1913, when this suit was brought, it was not doing business in this state. T. H. Clere, on whom the summons was served, was at that time only temporarily within the state with no intention of making this state his permanent residence. The motion was denied.

The salient facts are as follows: In April, 1912, the Prager-Schlessinger Company, a Washington corporation doing a retail clothing business in the city of Spokane, was

subjected to involuntary bankruptcy proceedings in the United States district court for the eastern district of Washington. The defendant herein, a creditor of the Prager-Schlessinger Company, effected a composition with the other creditors, advancing for that purpose approximately $26,000, which it borrowed on its note from the National Bank of Commerce, at Spokane. The trustee in bankruptcy, by order of court, made to the defendant herein a bill of sale of the merchandise, furniture and fixtures belonging to the Prager-Schlessinger Company. The secretary of the defendant company visited Spokane at that time and negotiated the loan and arranged the matter on behalf of the defendant.

The defendant received the goods and in May, 1912, put them on sale at retail through its sales agents, H. L. Gilmore & Company. That company was authorized by the defendant to sell the goods and pay the proceeds into the National Bank of Commerce to be applied on the loan made to the defendant. There was no evidence that the Gilmore Company had any other business. The evidence makes it clear that this retail sale was operated by the defendant through its agents. The defendant at all times financed and retained absolute control of the business. The agents sold part of these goods, paying the proceeds to the bank until the latter part of July, 1912. During this time the defendant shipped about $21,000 worth of goods to these agents, who, also, from time to time, replenished stock by small outside purchases. About August 1, 1912, by order of the defendant, the remaining goods were delivered to the Prager-Schlessinger Company. This delivery was likewise with the understanding that the Prager-Schlessinger Company was to act simply as selling agent, and was to turn over the proceeds realized from sales to the National Bank of Commerce to be credited on the defendant's indebtedness with the bank. The stock was at all times insured in the name of the defendant and the premiums were paid by the defendant. A retail

business was conducted through this new agent with this stock of goods until January 25, 1913, when defendant claims to have sold the goods to the Prager-Schlessinger Company, merely taking that company's note for something over $30,000, the alleged sale price. It is not claimed that any written contract or bill of sale was made.

After August 1, 1912, and until June, 1913, the defendant at different times delivered shipments of goods to the Prager-Schlessinger Company to the value of over $6,000. These were placed in stock, sold as other goods, and the proceeds applied in the same way. About July, 1912, the Prager-Schlessinger Company was reorganized. Louis Schlessinger was made president and manager and Henry R. Newton, one of defendant's local attorneys, was made secretary. T. H. Clere, president of the defendant company, held 498 shares of capital stock of the Prager-Schlessinger Company, and Louis Schlessinger and Henry R. Newton each held one share. This was a trust arrangement for the purpose of controlling the management of the company while the defendant's goods were in its possession. At the time of the alleged sale, no apparent change was made in the manner of conducting the business. The defendant's president and its attorney still retained all but one share of the capital stock. Smith and Clere testified that the Clere Clothing Company never authorized Louis Schlessinger to purchase goods from the plaintiff's assignor. The evidence, however, shows that Smith and Newton both knew that he did purchase goods from others than defendant and, though Smith objected, no active steps were taken to stop the practice. Defendant's witnesses also testified that Schlessinger was never authorized to issue checks in defendant's name against defendant's account with the bank. Nevertheless, during the period between August 1, 1912, and January 25, 1913, Louis Schlessinger issued many checks on the National Bank of Commerce against the account, some in the name of the Clere Clothing Company. So far as the record shows, his

authority to do so was not questioned. It is claimed that defendant did not know of this. Between August 31, 1912, and June 3, 1913, Schlessinger purchased, from time to time, goods from the Spokane Dry Goods Company to the value of $2,003.83, apparently to replenish stock, and had them charged to the defendant. The sum of $1,498.36 was paid on this account by checks, one in the name of defendant, the others in the name of Prager-Schlessinger Company, all signed by Louis Schlessinger and all charged against the defendant's bank account. Schlessinger at first endeavored to have these goods charged to the Prager-Schlessinger Company, but in view of the former bankruptcy of that company, the Spokane Dry Goods Company refused to sell to it. On Schlessinger's assurance that he represented the Clere Clothing Company and that the two companies were one and the same, the Dry Goods Company finally sold the goods on the credit of the Clere Clothing Company, after inquiring at the National Bank of Commerce and learning that Schlessinger was running a checking account in the name of the Clere Clothing Company. All this, it is claimed by defendant's witnesses, was without the knowledge of defendant or its officers. On August 8, 1913, the Prager-Schlessinger Company went into voluntary bankruptcy.

The trial was had to the court, defendant preserving its special appearance. The court found that the Spokane Dry Goods Company, between August 3, 1912, and June 3, 1913, sold and delivered to defendant, goods, wares and merchandise of the agreed value of $2,003.83; and that defendant had paid thereon $1,498.36, leaving a balance of $605.47, with interest from August 3, 1912, in favor of the plaintiff as assignee of the Dry Goods Company. Judgment was entered accordingly. Defendant's motion for a new trial was overruled. From the order denying its motion to quash the summons, the final judgment and the order overruling its motion for a new trial, the defendant appeals.

The appellant's contentions may be epitomized as follows: (1) that the court erred in refusing to quash the service of summons; (2) that the court erred in holding that the plaintiff's assignor was justified in charging the goods to the appellant. These questions are soluble on the same facts. They are so closely related that the solution of the one will determine the other.

I. It is conceded that, if the appellant was doing business in the state of Washington, then the service by delivery of summons to its president, though at a time when he was only temporarily within the state, was valid service on the appellant. The appellant claims that it never did business in this state, other than the isolated transaction of effecting the composition with the other creditors in the first bankruptcy proceedings. This claim is untenable. That transaction was a purchase by the appellant of the bankrupt stock. This is conceded. But it is urged that the deliveries of the goods to Gilmore & Company and subsequently to the Prager-Schlessinger Company, were consignments. In the broad, loose sense of the term, they were, but not in the sense that even a qualified title passed to the consignee. The evidence makes it too plain for argument that the delivery to Gilmore & Company and the original delivery to the Prager-Schlessinger Company were not consignments in the ordinary commercial sense of a transmission to an independent merchant or factor for sale on commission. They were mere deliveries to the appellant's agents to sell at retail and deposit the proceeds to the appellant's credit. The appellant financed the business in both instances and retained absolute control of the goods. The possession of the goods was at all times that of the appellant by its sales agent.

The fact that the Prager-Schlessinger Company was a corporation does not alter the case. The reorganization of that company, at the time of the original delivery to it of the goods, was for the confessed purpose of giving the appellant an absolute control and oversight of its agent. This

emphasizes the correctness of our conclusion. Clere at all times acted for and in behalf of the appellant. When he and the appellant's attorney took over, solely in consideration of the agency, practically the entire capital stock of the Prager-Schlessinger Company, that company, by every just and reasonable intendment, became a subsidiary corporation of the appellant. This status being once established, as it clearly was, if evidence short of an admission can establish anything, it was incumbent upon the appellant to show that the Prager-Schlessinger Company was rehabilitated as an independent entity with complete control of its own functions and destiny at the time of the alleged sale of the goods to it on January 25, 1913. This the evidence wholly fails to establish. All of the capital stock of the corporation save one share was still in effect owned, and in reality controlled, by the appellant through its president and attorney, who still constituted two of the three trustees. The attorney was still retained as secretary. The appellant's bank account was still used *ad libitum* by the Prager-Schlessinger Company. True, the appellant's officers claim this was unauthorized and unknown to them, but it taxes credulity to assume that it knew nothing of the state of its own bank account for months, especially since it had, at the situs of the whole transaction, its own attorney, who was also trustee and secretary of the Prager-Schlessinger Company, confessedly so constituted for the appellant's protection. The very fact that no formal bill of sale was made and no chattel mortgage taken to secure the payment of the alleged purchase price of the goods further lends strong color to the view that the Prager-Schlessinger Company was still what it had been from the date of its reorganization, a subsidiary company of the appellant. Many other circumstances in evidence point to the same conclusion. We are by no means satisfied that the trial judge erred in holding, as he evidently did hold, that the Prager-Schlessinger Company was a mere agent or

instrumentality through which the appellant was transacting its own business in the city of Spokane up to the commencement of this action. It may not be improper to remark that, in the second bankruptcy proceedings, the Federal court, Judge Rudkin presiding, so held and refused to allow the note for the alleged purchase price of these goods as a claim against the bankrupt estate in favor of the Clere Clothing Company. For decisions sustaining this conclusion on closely analogous facts, see *In re Muncie Pulp Co.*, 139 Fed. 546; *Glidden & Joy Varnish Co. v. Interstate Nat. Bank*, 69 Fed. 912. Courts no longer hesitate to look through forms to substance, and ignore a mere colorable corporate entity to the end that rights of third parties shall be protected. *In re Rieger, Kapner & Altmark*, 157 Fed. 609; *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585, 19 Atl. 428, 19 Am. St. 663; *First Nat. Bank of Chicago v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834; *Donovan v. Purtell*, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176.

The appellant was a foreign corporation doing business in this state. In such a case, service of summons may be made by delivery to "any agent, cashier or secretary thereof." Rem. & Bal. Code, § 226, subd. 9 (P. C. 81 § 143-5). The appellant's president was in this state upon its business when the service was made. He was its agent. The service was properly sustained. *Commercial Mut. Accident Co. v. Davis*, 213 U. S. 245; *Premo Specialty Mfg. Co. v. Jersey-Creme Co.*, 200 Fed. 352; *Cone v. Tuscaloosa Mfg. Co.*, 76 Fed. 891. The case of *Carstens & Earles v. Leidigh & Haven Lumber Co.*, 18 Wash. 450, 51 Pac. 1051, is distinguished on its facts. In that case the trial court found that the foreign corporation had never done any business in this state, and no exception was taken to the finding.

II. Under the circumstances of this case, the Spokane Dry Goods Company was justified, on Schlessinger's direction, in charging the goods to the account of the appellant.

True, it dealt with a person who assumed to act as agent and was put upon inquiry as to the agent's authority. There can be no question of the agency at the time the account was opened. As we have seen, the evidence was sufficient to justify the view that the Prager-Schlessinger Company was but an *alter ego* of the appellant and so continued to the commencement of this suit. Schlessinger was manager of this *alter ego*. The Dry Goods Company was put upon inquiry, but it was required to inquire no further than to learn the truth. The purchase of the goods to replenish a retail stock can hardly be said to be beyond the apparent scope of the manager's authority. It is the general rule that a third person is warranted in dealing with an agent touching the subject-matter of the agency in all things within the apparent scope of his authority. *O'Daniel v. Streeby*, 77 Wash. 414, 137 Pac. 1025; *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593.

We find no warrant, either in evidence or law, for disturbing the judgment. It is affirmed.

MOUNT, CROW, FULLERTON, and MAIN, JJ., concur.

[No. 12226. Department One. April 5, 1915.]

H. N. MARTIN, *Respondent*, v. W. A. WILSON, *Appellant*.[1]

PARTNERSHIP—DISSOLUTION—RECEIVERSHIP. In an action for an accounting between law partners, the appointment of a temporary receiver is warranted, where it appears that the parties are so hostile that there can be no reconciliation, one of the firm, by his control of the books, excludes the other from participation in their affairs, accounts are due the firm, and there are debts to be paid, and property to be cared for.

PARTNERSHIP—DISSOLUTION—APPLICATION FOR RECEIVERSHIP—DESCRIPTION OF PROPERTY. A complaint asking for the appointment of a receiver for a partnership and describing the property involved as notes, accounts, personal property and lands, will not be held an insufficient description, where the extent and condition of the property depends upon the books and accounts of the partnership, which are in the hands of the partner objecting to a receivership, and which must be presumed as showing the affairs and property of the partnership.

RECEIVERS—APPOINTMENT—CONSTRUCTION OF ORDER. An order appointing a receiver for a law partnership, does not authorize the receiver to take charge of the business of the firm pending in the courts, where it merely directs the receiver to collect outstanding accounts, notes and obligations of every kind due the firm, with power to assemble and bring suit for obligations due, followed by a general direction "to take charge of any and all business of every kind and nature belonging to said firm."

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered May 2, 1914, appointing a receiver for partnership property, after a hearing before the court. Affirmed.

W. A. Wilson, in propria persona.

H. N. Martin, in propria persona.

CHADWICK, J.—The parties to this action have for several years been partners in the practice of the law at Davenport, Washington.

[1]Reported in 147 Pac. 404.

The complaint alleges, and the affidavits filed by the respective parties show, that in that time they have done a business of considerable volume; that the books have been kept by, and are now in the possession of, the appellant; that there are notes and accounts due the firm, and that there are debts to be paid. It is also alleged that the parties own certain lands. The record is not clear that this is so, but we will assume it to be so because the trial judge directed the receiver when appointed to take charge of lands as well as other property.

Several questions of practice have been raised by the appellant, but it is our opinion that they become immaterial in the light of the main question, that is, whether there was a sufficient showing made to warrant the court in appointing a receiver.

It might have been held that a temporary receiver should not have been appointed without notice if that were the only question before us, but the record shows that the parties have appeared and submitted the whole matter to the court, and, upon the testimony, the court entered the order now complained of. Affidavits signed by each of the parties clearly indicate that the parties are so hostile to each other that it is not likely that there will be any reconciliation between them, or that the affairs of the partnership can be settled in a harmonious way. We think it is also clear that the books and a knowledge of their contents and the business of the firm is within the knowledge and keeping of the appellant, and that in a sense respondent is excluded from a participation in the affairs of the concern, such exclusion resting upon a lack of understanding of the state of the accounts and business of the firm. Furthermore, an accounting is prayed for.

The rule is well established that where a partnership has been dissolved, or a suit for dissolution and an accounting is pending and there is a serious lack of understanding and harmony between partners, and one partner is excluded from

any voice in the management and control of the affairs of the partnership, a receiver will be appointed. *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *Redding v. Anderson*, 37 Wash. 209, 79 Pac. 628; 30 Cyc. 726 *et seq.* The rule may be epitomized: if the parties to a partnership will not trust each other, equity will not trust either of them to settle an affair in which each of them, but for their differences, would be entitled to share in equal degree.

We think the case fairly falls within the principle laid down by this court in the case of *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 104 Pac. 207, where a like situation, in so far as the relation of the parties is concerned, was before the court. It was held that, notwithstanding the rule that courts would hesitate to appoint a receiver in aid of minority stockholders of a corporation, where the two who were contending were the sole and equal owners of the stock of the corporation, they would be treated as partners. In that case we said:

"Would a court of equity in the furtherance of justice and in the exercise of its sound discretion be justified in directing the appointment of a receiver over the respondent corporation, or should the appellant be turned out of court without other relief than a temporary accounting, with the certainty that, while present conditions continue, he will be compelled to return and incur the expense of repeatedly seeking the aid of the chancellor to secure further accountings and protection of his rights as a stockholder? Although the appellant and R. J. Linden each own one-half of the capital stock, the latter is in exclusive possession. He arbitrarily conducts the corporation business, makes book entries, declares or refuses dividends, raises his own salary, retains his subservient trustees in office, and through them performs such corporate acts as he chooses. He and Boothe are not partners, yet their relative position, created by their contract of sale, is kindred to that of partners. Linden has thereby obtained absolute control of $25,000 in value of the appellant's estate, which he is arbitrarily handling without consulting the appellant or granting him the least consideration. Such a condition is an intolerable one for the appel-

lant, and one that would not be permitted in a partnership. Were their positions changed, Linden would doubtless demand a receiver with as much energy as he now opposes one. If they were partners, a receiver would unquestionably be granted. No rights of creditors, other stockholders, or third parties are here involved. The only real parties in interest are Boothe and Robert J. Linden. As above stated, their position is kindred to that of partners. Present conditions will undoubtedly continue unless a court of equity affords relief. Should they continue? We think not."

While all of the circumstances which we found to exist in that case do not exist in this one, we do find enough in the disharmony of the parties and the right to an accounting to bring this case within the rule there announced. This disharmony and the need of an accounting is as clearly shown by the affidavit of the appellant as it is by that of the respondent. *Whipple v. Lee*, 46 Wash. 266, 89 Pac. 712. See, also, *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485. In the *Whipple* case, a receiver was appointed to take over a partnership pending a settlement of its affairs.

Appellant contends that the property of the partnership is not sufficiently described in the complaint. It is his contention that unless the complaint and order of the court, the one or the other, or both, so described the property that the receiver can take possession thereof without further inquiry, the order will not be sustained.

The rule is well established that the property should be described with reasonable certainty. 34 Cyc. 113. But it will not be held that, where the extent and condition of the property depends upon the books and accounts of the partnership and which we must assume will show its affairs and the property owned by it, the property is not described with reasonable certainty, although referred to in a general way as notes, accounts, personal property and lands.

It is finally contended that the court appointed a receiver to take charge of the cases now pending in the superior

court of Lincoln county in which the parties to this action have been employed as attorneys. It is true that, in the affidavit filed by the respondent, he says that it is necessary that a receiver be appointed to take charge of the business of the firm now pending in the courts, but the order appointing a receiver does not go that far. The receiver is directed to take charge of the property of the parties pending an accounting which must necessarily follow. It is true that the order directs that the receiver shall take charge of all business of the firm, but this follows directly after a direction to "collect any and all outstanding accounts, notes and obligations of every kind and nature due said firm, and to report the same to this court, especially giving him power and authority to assemble said property and to bring suit for the collection of any obligations due said firm," thus, "and in short to take charge of any and all business of every kind and nature belonging to said firm, etc." When read together, we think it is sufficiently clear that the court had no intention, as he probably had no power, to appoint a receiver to attend to the practice of the parties in the courts of this state.

The judgment of the lower court is affirmed.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 12228. Department One. April 5, 1915.]

YOUNG MEN'S CHRISTIAN ASSOCIATION OF WENATCHEE, *Respondent*, v. OLDS COMPANY, *Appellant*, A. J. OLDS *et al.*, *Defendants*.[1]

SUBSCRIPTIONS—LIABILITY—CHANGE OF PLAN. A subscriber for a building fund for the erection of a Y. M. C. A. building, planned to cost $35,000 but which in fact cost $66,295, cannot, on that ground, escape liability, when the only condition attached to the subscription was that $25,000 should be raised before a certain date and that condition was fully met; the enlargement of the scope and purpose of the beneficiary and the increase in the subscription fund constituting no detriment to defendant.

SAME. Where a subscriber to a building fund permits work on the construction of the building to be carried on for a length of time, he will be regarded as acquiescing in a change in plans whereby its cost was greater than originally contemplated, and cannot urge that fact as relieving him of liability.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered February 5, 1914, upon findings in favor of the plaintiff, in an action on a subscription contract, tried to the court. Affirmed.

Reeves, Crollard & Reeves, for appellant.

Cade & Barrows, for respondent.

HOLCOMB, J.—Defendants, for and on behalf of appellant, The Olds Company, a corporation, signed and delivered to a solicitor raising a fund for the construction of a Young Men's Christian Association building in Wenatchee, a subscription agreement in writing as follows:

"$35,000.00 Y. M. C. A. Building Fund.

"$250. Wenatchee, Wash., 5-27, 1910.

"For the purpose of purchasing a site and erecting a building for the proposed Wenatchee Young Men's Christian Association, and in consideration of the gift of others, I hereby agree to give the sum of Two Hundred Fifty Dollars

[1]Reported in 147 Pac. 406.

on condition that at least $25,000 is raised before May 29, 1910. Payable in two equal consecutive installments: $125 Dec. 31, 1910 $125 Dec. 31, 1911

"The Olds Company,
"By A. J. Olds, A. W. Olds and J. T. Olds."

"Two Hundred and Fifty Dollars Club 25 needed. (Obtained by Collier of Company I, Collier Captain.)"

The agreement was accepted by the respondent, and subscriptions aggregating the specified sum of $25,000 were obtained prior to May 29, 1910. The building cost a large sum in excess of the $35,000 originally contemplated, and other subscriptions were solicited and received to meet the total cost, amounting to $66,295. Defendants refused to pay the amount of their subscription agreement at the times therein specified, or at all, and this action was begun to recover the amount thereof, and judgment was granted in favor of respondent and against the appellant, The Olds Company, a corporation, alone, for the amount of the subscription agreement, with interest. From the judgment, The Olds Company appeals.

The appellant first lays great stress upon the clause at the head of the subscription agreement, reading: "$35,000 Y. M. C. A. Building Fund," the same having been printed in red ink, and insists that this was a guaranty to the subscriber that the building should cost not to exceed $35,000. Appellant insists that the erection of a building greatly exceeding in cost the original contemplation of $35,000 was a violation of the subscription agreement and invalidated it, upon the principle that "any material change in the plan or purpose for which the subscription was made cannot be effected without the consent of the subscriber. He is thereby released unless there has been a waiver, or unless he has estopped himself to deny his consent to the change." 37 Cyc. 498. The reason underlying that principle is that there is a failure of consideration. *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. 767, 3 L. R. A. 468.

It is undoubtedly true that a diversion of the funds from one avowed purpose to another purpose would release a subscriber. Thus, if a subscription were obtained to build a church and it was used to build a business block, the subscriber would be released, unless he consented thereto. And so, manifestly, if the funds subscribed were not used at all, but retained and appropriated by the promisee to his own use. But here the funds were not diverted nor misappropriated. They were used to construct the building contemplated. The single condition specified in the agreement was that it was to be effective only upon $25,000 being subscribed by May 29, 1910. This condition was met. The purpose and plan of the beneficiary were strictly pursued. The fact that the scope and purpose of the beneficiary were enlarged and the subscription fund increased constituted no detriment to appellant, and, in the light of the circumstances, will not release it. Even though representations were positively and expressly made to a subscriber that the building to be constructed should cost no more than $35,000, "Where a representation which induced the subscription is promissory in its nature, and not a statement of existing fact, it has been held that the contract cannot be avoided by a subscriber because of such misrepresentation." 37 Cyc. 494; *Paddock v. Bartlett*, 68 Iowa 16, 25 N. W. 906; *Perkins v. Bakrow*, 45 Mo. App. 248. It is generally held that, if work has been done or expenditure has been made upon the faith of and in reliance upon a subscription, a consideration is thus furnished to support the promise. 37 Cyc. 486; *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696. Moreover, where the subscriber permits the work to be carried on for a length of time without objection, as was the case here, he will be regarded as acquiescing in the acts done, and will not be relieved from payment of the subscription on the ground that the plan has been changed and the work is of no benefit. *Ex parte Booker*, 18 Ark. 338.

The conditions attached to appellant's subscription promise were fully met. The judgment appealed from is right, and is affirmed.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

[No. 12263. Department One. April 5, 1915.]

JAMES HENRY, *Appellant*, v. CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, *Respondent*.[1]

CARRIERS—CARRIAGE OF LIVE STOCK—ACTIONS—LIMITATION OF LIABILITY. A stipulation in a contract for the shipment of live stock, rendering claims for loss, injury or damage invalid unless presented in writing within thirty days after the same shall have occurred, is not a contract exempting the company from liability, within Rem. & Bal. Code, § 8648, providing that no contract or regulation shall exempt any corporation engaged in transporting live stock by railway from liability of a common carrier of live stock which would exist had no contract, etc., been entered into.

CARRIERS—CARRIAGE OF LIVE STOCK—ACTIONS—BURDEN OF PROOF. A contract requiring claims for damages arising from the transportation of live stock by common carriers to be presented within thirty days fixes a condition precedent to right of recovery, and thus imposes the burden of proving the presentment of such claim on the party seeking damages under such a contract of carriage; hence nonsuit is proper, where plaintiff's evidence failed to show the presentation of such a claim, the contract being before the court at the time.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SURPRISE. A new trial on the ground of surprise and newly discovered evidence is properly denied, where the surprise consisted in rulings of the court in the progress of the trial inducing plaintiff to believe that the burden of proving thirty days' precedent notice of his claim was on defendant as a matter of defense, and plaintiff's newly discovered evidence of presenting his claim was insufficient, consisting of letters received long after expiration of the time limited.

COSTS—MILEAGE—WITNESSES. The mileage and per diem fees for witnesses at the statutory rate are properly taxed as costs although they were employees of the prevailing party and traveled free at such party's expense; especially where the loss of their employment, their maintenance, and expense in transportation would be no more than repaid by the allowance of those items.

[1]Reported in 147 Pac. 425.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 14, 1914, upon granting a nonsuit, dismissing an action of tort, after a trial before the court and a jury. Affirmed.

Ryan & Desmond, for appellant.

Geo. W. Korte, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court for King county, seeking recovery of damages which he claims resulted from the negligence of the defendant in handling and caring for four shipments of live stock for him, materially impairing their value. The cause proceeded to trial before the court and a jury, when, at the close of the evidence introduced in behalf of the plaintiff, counsel for the defendant moved for judgment upon the ground, among others, that there had been no evidence introduced showing that the plaintiff had presented to the defendant in writing his claim of alleged loss as required by the stipulations of the written contracts for the shipments. The court granted the motion upon this ground and rendered judgment of dismissal accordingly. From this disposition of the cause, the plaintiff has appealed.

Appellant is engaged in the wholesale meat and butcher business at Seattle. He buys live stock throughout the northwestern states, shipping the same to his plant at Seattle. Three of the shipments here involved were from points in Montana to Seattle, in this state. One was from Castleton, in this state, to Seattle. So three of them were interstate shipments and one was an intrastate shipment. Appellant pleads four causes of action, claiming damages in connection with each shipment separately. He does not in his complaint make any reference to any conditions contained in written contracts of shipment, proceeding in his complaint, evidently, upon the theory that there were no contracts of shipment other than such as would be implied from the mere fact of the shipments being made. In its an-

swer, respondent denies the negligence charged against it, and also the alleged damage resulting to appellant, and as an affirmative defense, alleges the entering into written contracts for each of the shipments, each of which contracts contain, among other stipulations, the following:

"No claim for loss, injury or damage to said live stock, nor for delay or decline in the market, nor for injury to the owner or person in charge thereof, shall be valid unless presented to the company in writing within thirty days after the same shall have occurred;"

and further alleges that none of appellant's claims for damage were presented in writing in accordance with the terms of this stipulation of the contracts.

Appellant replied to this affirmative defense by a general denial only. This general denial was apparently made upon the theory that the stipulation in the contracts as to presentation of claims for damage is void under the law of this state, and therefore has no lawful existence as a part of the contracts, rather than that such stipulation was not in fact embodied in the contracts or that the contracts were not in writing. This theory seems apparent from subsequent events occurring during the trial.

Upon cross-examination of appellant's witnesses who had signed each of these written contracts for him, and as a part of their cross-examination, each written contract was introduced in evidence by counsel for respondent over the objection of counsel for appellant. This objection was made to the introduction of each written contract upon the ground, in substance, that the stipulation contained therein, requiring claims of damage to be presented to respondent in writing within thirty days after the same shall have occurred, is void under the law of this state. The written contracts were offered in evidence only for the purpose of showing this stipulation. Other stipulations in the contract are of no consequence here.

One of the shipments originated upon the line of the Oregon Short Line Railroad Company in Montana, and was transferred to respondent's line at Butte, Montana. The original contract entered into between the Oregon Short Line Railroad Company and the appellant contained a similar stipulation to that in the other contracts as to making claim of damage, which provision, however, did not require such claim to be made in writing. This was the contract pleaded in respondent's affirmative defense to appellant's third cause of action. Upon the transfer of that shipment to respondent's line at Butte, a new contract was entered into between respondent and appellant in exactly the same form, containing the same stipulation as to presentation of claim of damage as in the other contracts of shipment entered into between respondent and appellant. This contract between respondent and appellant, relating to the shipment involved in the appellant's third cause of action, was introduced upon cross-examination of appellant's witnesses who had signed the same for him, as all the other contracts were, and without any objection thereto other than that made to the introduction of the other contracts. This being true, we will treat the affirmative defense to appellant's third cause of action as amended to conform to this proof. Some contention is made by counsel for appellant in an attempt to confine respondent's defense to the third cause of action to the original contract of shipment entered into with the Oregon Short Line Railroad Company, in order to avoid the duty so far as that shipment is concerned of presenting any claim of damage in writing. This contention, however, we think is without merit in view of the facts we have noticed. We therefore proceed to a discussion of the case in the light of the fact that all four contracts entered into between appellant and respondent are exactly alike. Other facts will be noticed as may become necessary in our discussion of the several contentions made by counsel.

Counsel for appellant contend that the trial court erred in holding that the stipulation in the shipping contracts rendering claims of damage invalid as against respondent unless presented in writing within thirty days after the same shall have occurred is of binding force and effect upon him. It is insisted that this stipulation of the contracts is void as being in contravention of the public policy of this state and, therefore, not enforcible in our courts, under the provisions of our public service commission law reading as follows:

"That no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting livestock by railway from liability of a common carrier, or carrier of livestock, which would exist had no contract, receipt, rule, or regulation been made or entered into." Rem. & Bal. Code, § 8648.

In support of this contention, counsel principally rely upon our decision in *Carstens Packing Co. v. Southern Pacific Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A. (N. S.) 975, holding that, in the light of public policy as declared by this statute, a common carrier cannot by contract exempt itself from liability for loss or injury caused by its own negligence. It is insisted that, while that was a stipulation attempting to specifically exempt the carrier from liability for loss caused by its own negligence, the stipulation here involved no less contravenes the public policy declared by our statute, in that it equally in terms limits the liability of respondent as a common carrier, although differing in terms as to the subject-matter of limited liability.

This court has not had occasion to consider the validity of a stipulation in a contract of this exact nature in the light of our statute above quoted. We have, however, in the case of *Carstens Packing Co. v. Northern Pac. R. Co.*, 64 Wash. 256, 116 Pac. 625, had occasion to consider the validity of a stipulation in a shipping contract by which the shipper and the railway company agreed, at the time of making the

shipment, upon the value of each hog and sheep shipped. Such stipulation was there held to be binding upon the shipper as fixing the measure of his damage caused by loss of some of the hogs and sheep while in the hands of the railway company during the shipment, regardless of their real value and the actual damage resulting to the shipper from the loss. In that case the statute above quoted was held not to curtail the power of a carrier to so contract, and in so holding, Justice Mount, speaking for the court, said:

"This statute means that the common law liability cannot be avoided by contract. It is the duty of the carrier to safely transport the goods, and in case of loss from negligence or otherwise, the carrier is liable for their value, which duty may not be avoided. But the statute does not say, and we think does not mean to say, that the parties may not agree upon the value of the shipment before it is made. It simply means that the duty of the carrier to safely carry cannot be avoided by contract, and this is the public policy which the statute sought to declare. If the property is lost or injured, the carrier is liable for the injury or value of the property. But the parties are not, and were not at common law, prohibited from agreeing upon value, either before or after injury or loss has occurred."

Now since a stipulation of that nature may be lawfully made in a shipping contract, which may in a measure limit a shipper's recovery to an amount less than his actual damage to the property shipped, how can it other than logically follow that a stipulation may be lawfully made calling for the presentation of a claim in writing for damages by the shipper to the carrier within a limited time, reasonable in extent, which does not limit the amount of the carrier's liability? Such a stipulation, we think, does not "*exempt*" the railway company "*from liability of a common carrier, or carrier of live stock, which would exist had no contract, receipt, rule, or regulation been made or entered into,*" these italicized words being those of the statute. It was an agreement, we think, looking only to the manner of making and adjusting whatever claims of damage might arise.

In *Smith Meat Co. v. Oregon R. & Nav. Co.*, 59 Ore. 206, 117 Pac. 303, there was involved and considered the validity of a stipulation in a shipping contract reading as follows:

"Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability."

In upholding the validity and binding force of this stipulation, Justice McBride, speaking for the court, said:

"The stipulation that a claim of injury shall be presented within 10 days and before the stock shipped shall have been mingled with other stock is a reasonable stipulation on its very face. Transportation companies can only do business through employees, and the location of these, as well as the time of their employment, is subject to change. It is only fair that, in cases of this character, the corporation should be seasonably notified that a claim for damages would be insisted upon, in order that a careful inspection of the animals and timely inquiry into the conditions attending their transportation may be investigated and the actual facts ascertained.

"This is not a stipulation exempting the carrier from liability for negligence, but one giving it an opportunity to ascertain whether its servants have been, in fact, negligent. Such stipulations have been frequently upheld by the courts."

In *Giles v. Atchison, T. & S. F. R. Co.*, 92 Kan. 322, 140 Pac. 875, Justice Porter, speaking for the court touching the validity of a stipulation in a shipping contract making the presentation of a claim for damage a "condition precedent" to the shipper's right of recovery, said:

"A stipulation in a contract of shipment of live stock, that as a condition precedent to his right to recover damages for loss or injury during transportation the shipper shall give notice of his claim before the stock is mingled with other stock, has been repeatedly held to be a reasonable stipulation. *Sprague v. Mo. Pac. Ry. Co.*, 34 Kan. 347, 8 Pac. 465;

Railway Co. v. Kirkham, 63 Kan. 255, 65 Pac. 261; *Railway Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132; *Hayes v. Railway Co.*, 84 Kan. 1, 113 Pac. 421; *Ray v. Railway Co.*, 90 Kan. 244, 133 Pac. 847. A provision requiring such notice as a condition precedent to recovery is not a stipulation against the carrier's negligence. *Railway Co. v. Morris*, 65 Kan. 532, 70 Pac. 651. The Supreme Court of the United States, *Mo. Kan. & Tex. Ry. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690, has upheld the same kind of a stipulation where the liability arose under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593; U. S. Comp. St. Supp. 1911, p. 1307) on the ground that the liability which the Act of Congress imposes upon the carrier is only a continuation or extension of common-law liability."

These Oregon and Kansas decisions had reference to intrastate shipments, so that the conclusion reached therein did not present a Federal question and was not the result of any compelling influence of the decisions of the Federal courts under the so-called Carmack amendment to the interstate commerce act, except in so far as the decisions of the Federal courts were considered persuasive in support of the conclusion reached as a general proposition of law.

In *Southern Express Co. v. Caldwell*, 88 U. S. 264, a case decided before there was any Federal statute bearing upon the question, there was involved a stipulation in a shipping contract providing that the carrier should not be held liable for any loss or damage to the package shipped unless claim be made therefor within ninety days from its delivery to the express company. Considering the validity of this stipulation, notwithstanding the supreme court had theretofore committed itself to the doctrine that common carriers could not contract against liability resulting from their own negligence, Justice Strong, speaking for the court, said:

"It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is

only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit.

"It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in *Railroad Co. v. Lockwood*, 17 Wall. 357. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity, which the strictest rules of the common law ever required."

In *Atchison, T. & S. F. R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449, there was drawn in question the validity of a stipulation in a stock shipping contract, which provided that, as a "condition precedent" to the right to recover damages for loss or injury to the stock, the shippers should give notice in writing of their claim before such stock was removed from the place of destination and before being mingled with other stock, and that the failure to comply therewith should be a "complete bar to recovery for any and all such damage." In upholding the validity and binding force of this stipulation, Justice Gabbert, speaking for the court, said:

"Such stipulations, in brief, are upheld upon the theory that they are not opposed to public policy; that they are reasonable, and do not in any manner exempt the common carrier from negligence, but are conditions of recovery, and not exemptions from liability, which the carrier may lawfully include in its contract of shipment, for the purpose of protecting it against fictitious and unfounded claims for damages."

While that decision involved an interstate shipment and therefore a Federal question, it is apparent from the decision that the court reached its conclusion as a general proposition of law, without considering the problem as a Federal question. These views find support in *Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385, and *Gulf, Colorado & S. F. R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. 494. There are later Texas decisions which may seem out of harmony therewith, but when critically examined they will be found to rest upon a later statute of Texas which expressly prohibits railway companies from making any stipulation limiting the time for presentation of claims for damage at a less period than ninety days after the occurrence of the damage.

All of the above noticed decisions, other than our own, deal with the question entirely independent of statute. We notice them as lending support to the view that the stipulation in the contracts here involved is not a limitation upon respondent's liability to respond in damages, but is merely an agreement touching the manner of presenting claims of damage looking to a fair determination of the question of their justness.

In *Liquid Carbonic Co. v. Norfolk & W. R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753, the court had under consideration a stipulation in a shipping contract in substance the same as that here involved. At that time there was in force in Virginia a statute the same in terms as our own, except that the Virginia statute is applicable to all shipments, while ours relates only to live stock shipments. After a review of the question at some length, citing many authorities, the court arrived at the conclusion that the stipulation was a valid exercise of contracting power on the part of the railway company, notwithstanding the statute; and this manifestly upon the theory that such stipulation in the shipping contract did not purport to exempt the railway company from liability. It is of interest to note that this

decision was rendered in September, 1907, after the passage of the Carmack amendment, and although it relates to an interstate shipment, the conclusion was reached manifestly as a general proposition of law and without regard to there being a Federal question involved.

Turning now to the decisions of the Federal courts touching the effect of the Carmack amendment to the interstate commerce act, which has been the subject of much discussion in the Federal courts during the last few years, we first notice the terms of that amendment so far as here involved, which are as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." 34 Stat. 584, 595.

A comparison of this language with the provision of our public service commission law here invoked by counsel for appellant, we think renders it apparent that the Federal statute goes as far in limiting the right of common carriers to contract touching interstate shipments as our own law does touching intrastate shipments. In other words, whatever may be lawfully contracted for under the Federal law may be lawfully contracted for under our law. This fact will render the decisions of the Federal courts upon the subject of material aid to us here, viewing them simply as authorities upon the general problem, rather than as of compelling force upon a Federal question.

In *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, the court considered the binding force and validity of a live

stock shipping contract wherein it was stipulated, among other things, that:

"No suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute or limitation to the contrary notwithstanding."

In deciding that this was a lawful stipulation in the light of the provision of the Carmack amendment above quoted, Justice Lurton, speaking for the court, at page 671, said:

"It is conceded that there are statutes in Missouri, the state of the making of the contract, and the state in which the loss and damage occurred, and in Texas, the state of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract was brought within the statutory period of both states.

"The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. *Adams Express Co. v. Croninger*, 226 U. S. 491; *Michigan Central Railroad v. Vreeland*, 227 U. S. 59. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. *Adams Express Co. v. Croninger*, and *Michigan Central Railroad v. Vreeland*, cited above; *York Co. v. Central Railroad Co.*, 3 Wall. 107; *Railroad Company v. Lockwood*, 17 Wall. 357; *Express Company v. Caldwell*, 21 Wall. 264, 267; *Hart v. Pennsylvania Railroad*, 112 U. S. 331.

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall

not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. 386. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in *Express Company v. Caldwell*, 21 Wall. 264. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases."

That decision is also authority in support of the view that a stipulation in a shipping contract, agreeing upon the value of the property shipped, and that such agreed value becomes the measure of the shipper's damage in case of loss or injury thereto, is lawful. This is also our conclusion reached in *Carstens Packing Co. v. Northern Pac. R. Co.*, *supra*, which we think is applicable here by analogy. The eighth and ninth Federal circuit courts of appeals in *Clegg v. St. Louis & S. F. R. Co.*, 203 Fed. 971, and *Kidwell v. Oregon Short Line R. Co.*, 208 Fed. 1, reached same conclusions as to the validity of a stipulation requiring claims for damages to be presented in writing within a specified time. It is of interest to note that the decision in the *Clegg* case was made within a month following the decision of the supreme court in the *Harriman* case, which decision in the *Harriman* case is not mentioned in the circuit court's opinion. It would seem that the circuit court reached its conclusion in harmony with, but independent of, the views of the supreme court. Even in the *Kidwell* case, decided a few months later, we do not find any citation of the supreme court's decision. It therefore seems probable that the circuit court reached its decision in that case in harmony with, yet independent of, the views of the supreme court.

We have noticed these Federal decisions simply as being persuasive in support of our conclusion that the stipulation

in each of these contracts here involved is valid and binding upon the appellant in the light both of our public service commission law and the interstate commerce law, regardless of the Federal questions involved. Of course, as to the three interstate shipments in connection with which damage is claimed, there is presented a Federal question; and as to those causes of action, we may observe that, in any event, we would be required to follow the Federal decisions rendered in the light of the Carmack amendment. But we prefer to place our decision of this question upon the broader ground of general legal principles, regardless of the Federal question involved. This renders it unnecessary for us to differentiate between the three interstate shipments and the one intrastate shipment. Upon this broad ground we conclude that the stipulation in the contracts is valid and binding upon the appellant, and that he must have complied therewith as a condition precedent to his right of recovery.

Contention is made by counsel for appellant that the trial court erred in granting a nonsuit, upon the theory that the burden of proof rested upon respondent both as to the existence of the written contracts containing the stipulation requiring the presenting of claims of damage in writing within thirty days after the same shall have occurred, and the fact that there was a failure to present such claim in writing within that time after the occurrence of the damage. This contention is rested upon the theory that these are both matters of defense only. It is true they were so pleaded and that no reference to the written contracts was made in appellant's complaint. Had there been no proof before the court of the existence of these written contracts when appellant rested his case, it might be well argued that respondent would not have been entitled to a nonsuit. As to the mere fact of the existence of these written contracts under which the shipments were made, it is now of no consequence where the burden of proof lay, since they were before the court without objection, except as to their validity, in such man-

ner as to render their existence conclusive against appellant, when appellant had rested his case and the nonsuit was granted against him.

There was no proof whatever offered tending to show that appellant had presented to respondent his claims of damage in writing within the time prescribed by the stipulation in the shipping contracts. As to where the burden of proof rests as to this particular fact is somewhat more difficult, and a question upon which the courts are seemingly not harmonious. However, when we remember that the stipulation in effect makes the presentation of such claims in writing within thirty days after the occurrence of damage a condition precedent to appellant's right of recovery, we think that the question must be resolved in respondent's favor by placing the burden of proof upon the appellant. This is not a mere limitation of time, but it imposes upon appellant a duty to be performed by him before he can recover, unless the right of respondent to have such duty performed be in some manner waived, as to which there is nothing to show in this record. In *The Westminster*, 127 Fed. 680, there was involved the libelling of the steamship City of Westminster, seeking recovery of damages for injuries to goods delivered to the ship for transportation. Disposing of the question of burden of proof, Judge Archibald, speaking for the circuit court of appeals, said:

"The libel was dismissed on the ground that no notice of claim was given by the consignees before the removal of the goods. This is in exact accord with the ruling of this court in the case of *The St. Hubert*, 107 Fed. 727, 46 C. C. A. 603, from which it cannot be distinguished. The bill of lading there, as here, provided that neither the shipowners nor their agents or servants should be liable 'for any claim notice of which is not given before the removal of the goods;' and it was held that without such notice there could be no recovery. The purpose of the provision, as there pointed out by Gray, J. is that the shipowners may know, not merely whether there is damage—for which no demand may ever be made—but whether any claim for damages is asserted by

the consignee, so that the necessary investigation can be made to ascertain the facts while they are fresh. The notice stipulated for is not of the fact of damage, more or less, but of the intent to hold the carrier liable for it, which, on failure to give notice, the latter, in view of the stipulation, may well regard as being waived.' . . .

"It is said, however, that there was no satisfactory evidence that notice had not been given, and that the rule with regard to the burden of proof was not properly applied. But the confusion, if any, grows out of supposing that want of notice was to be proved in the first instance by the respondent. The giving of notice was an affirmative fact peculiarly within the knowledge of the libelants, both with regard to the time when, and the agent or representative of the shipowners to whom, it was given; and the want of it having been set up in the answer—whether original or amended, does not matter—it was incumbent on the libelants to prove it, as a condition of the right to recover. 6 Cycl. Law & Proc. 506; *Metropolitan Trust Co. v. Toledo R. R.* (C. C.), 107 Fed. 628; *U. S. Express Co. v. Harris*, 51 Ind. 127; *Osterhoudt v. Southern Pacific Co.*, 47 App. Div. 146, 62 N. Y. S. 134. Even if the stipulation could be regarded as in the nature of a statute of limitations (*Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118), which it is declared in *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, that it is not, still, having been pleaded, and the libelants thereby notified that it would be relied upon, they were bound by every rule to show compliance, or that which would excuse it, or be barred."

This language is applicable here. The damage resulting to appellant was a fact particularly within his knowledge, not only when he received the stock at its destination in Seattle, but at other times and points along the line of transportation, since each shipment was accompanied by an agent of appellant. There would seem to be even more reason in the rule when applied to shipments of this nature than when applied to shipments of goods which are entirely within the care and control of the carrier. The question was similarly dealt with in *Kalina v. Union Pac. R. Co.*, 69

Kan. 172, 76 Pac. 438, where Judge Cunningham, speaking for the court, said:

"The clause in question is not one exempting the carrier from its common-law liability, or limiting that liability, but one imposing a condition upon the shipper which he must observe before he may recover for a breach of the carrier's duty; in other words, it is a condition of recovery, and not an exemption from liability. Hence, when the shipper seeks a recovery, he must show compliance with the condition upon which recovery may be had. That in this case the shippers did not, in their bill of particulars, count upon this contract, or that the carrier did not plead it in defense, can make no difference. As soon as the plaintiffs admitted that they were endeavoring to recover under this contract, they were required to show compliance with the conditions upon which such recovery could be had."

The decisions of the Federal court of appeals in *Clegg v. St. Louis & S. F. R. Co.*, 203 Fed. 971, and *Kidwell v. Oregon Short Line R. Co.*, 208 Fed. 1, are in harmony with this view. In the *Kidwell* case, the court referred to the stipulation as a "condition precedent" to the shipper's right of recovery. *Lindblom v. Mayar*, 81 Wash. 350, 142 Pac. 695. Another reason that lends support to this view is that not only is the fact of the claim having been presented in writing or not particularly within the appellant's knowledge, but it would ordinarily be an easier matter for him to prove that such claim had been presented than for respondent to prove the negative thereof, especially in view of the fact that this particular stipulation is not specific in naming the place at which, or the servant of respondent to whom, such written claim of damage shall be presented. We are of the opinion that the presentation of such claim within the time prescribed was a condition precedent to appellant's right of recovery, and the burden of proving that such claim had been presented rests upon him.

Our attention is directed by counsel for appellant to our remarks touching the claim for damages filed by the shipper in *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239,

250, 108 Pac. 613, 27 L. R. A. (N. S.) 975, where we affirmed the lower court in admitting proof of an item of damage not specifically mentioned in the claim, which it is insisted are somewhat inconsistent with the requiring of appellant to present his claim in writing. It was, however, there pointed out that there was substantial compliance with the stipulation in the shipping contract in that regard, and the item of damage allowed to be proven was such as would naturally and probably result from the cause and general damage stated in the claim. This is not a question of substantial compliance with the stipulation. There was no compliance therewith.

One of appellant's grounds of new trial was surprise and newly discovered evidence. The alleged surprise consisted of rulings of the trial court made early in the progress of the trial, which counsel for appellant claims induced him to believe that the trial court was of the opinion that the burden of proving notice of appellant's damage and claim therefor to respondent was solely a matter of defense the burden of which rested upon respondent. There were some remarks of the trial court near the beginning of the trial which possibly thus indicated his opinion, and if the alleged newly discovered evidence would really avail appellant anything here, looking to a possible change in the result of the trial, there might be some substantial grounds for their contention in this regard if the evidence was in fact newly discovered. However, appellant's alleged newly discovered evidence consists simply of letters which are claimed to have been written by the manager of his business to respondent and received by respondent long after the time for presenting claims of damage under this stipulation of the contracts had expired. So even had this evidence been produced as a part of appellant's case upon the trial, it would have been unavailing to him. It would not have been proof of compliance with the shipping contracts. There were some statements in one of the affidavits offered in support of the motion

for new trial pointing to the fact that possibly one of these letters was written within the thirty-day period for the presentation of claims, but other affidavits presented in connection with the motion for new trial rendered it clear that none of the letters were received by respondent until long after the expiration of the thirty-day period. We are of the opinion that the denial of appellant's motion for new trial was not erroneous.

It is contended that the trial court erroneously denied appellant's motion to retax costs. It is insisted that the mileage and per diem of certain witnesses, claimed by respondent in its cost bill and allowed by the court, were excessive. This seems to be rested upon the theory that respondent should not be allowed these items computed at the statutory rates, because the witnesses were employees of respondent and were transported to the place of trial from without the state over appellant's line of railway free of expense to such witnesses. The mileage was claimed by respondent and allowed by the court from the state line only. We are unable to see any error in the allowance of these items as costs to respondent. The fact that the witnesses were employees of respondent and were transported to Seattle by respondent without expense to the witnesses, we think is not material, and even if it were, there were affidavits in respondent's behalf, presented to the trial court upon the hearing of the motion to retax costs, showing that the loss to respondent by having the witnesses away from their employment, their maintenance and the actual expense in their transportation, will be no more than repaid to respondent by the allowance to it of these items of cost. *Carlson Bros. & Co. v. Van de Vanter*, 19 Wash. 32, 52 Pac. 323; *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009; *Hofstetter v. Sound Trustee Co.*, 67 Wash. 537, 122 Pac. 6.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 12298. Department One. April 5, 1915.]

S. M. WHITE, *Respondent*, v. MAY WALKER *et al.*, *Appellants*.[1]

WITNESSES — TRANSACTIONS WITH DECEDENT — DELIVERY OF DEED. Under Rem. & Bal. Code, § 1211, providing that, where the adverse party sues or defends as deriving right or title by, through, or from any deceased person, a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with such deceased person, plaintiff, in an action to establish a lost deed, which had been executed to her by a grantor since deceased, cannot testify that, at a certain time and place and in the presence of a certain person, she had received the deed from deceased.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered May 16, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action to establish a lost deed. Reversed.

Freece & Pettijohn, for appellants.

H. N. Martin, for respondent.

MORRIS, C. J.—Respondent brought this action to establish a lost deed, alleging that, about six years prior to his death, the decedent, C. W. Walker, made, executed and delivered to her a warranty deed by which he conveyed a half section of land in Lincoln county. She then alleged the loss of the deed before recording, and prayed for a decree declaring her to be the owner of the property. Issue having been joined, a jury was called, and in due time a verdict returned in favor of plaintiff. The verdict having been entered, the court made findings of fact and conclusions of law, and entered a decree as prayed for in the complaint, from which the heirs and administratrix have appealed.

[1]Reported in 147 Pac. 409.

A number of errors are suggested, but finding one that is fatal to the judgment, we will refer to that only. The respondent was permitted, over the objection of appellants, to testify that, at a certain time and place, and in the presence of a Mr. Caton, she received the deed from the deceased. This was the only testimony as to the delivery and receipt of the deed. Rem. & Bal. Code, § 1211 (P. C. 81 § 1027), provides that, in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by any such deceased person. This testimony was a plain violation of the statutory rule, the receipt or delivery of a deed being such a transaction as clearly falls within the purview of the statute. This seems so plain to us that no authorities need be cited.

The judgment is reversed and a new trial ordered.

Parker, Mount, Holcomb, and Chadwick, JJ., concur.

[No. 12372. Department One. April 5, 1915.]

N. T. Bradley *et al.*, *Respondents*, v. Donovan-Pattison Realty Company *et al.*, *Appellants*.[1]

Mechanics' Liens—Operation—Priority by Relation. A temporary cessation of work, where the design of the performance is not abandoned and work is subsequently resumed and prosecuted without any substantial change in the plan, will not prevent relation back of a mechanics' lien to the time of the original commencement of work, in view of Rem. & Bal. Code, § 1147, which declares that the provisions of the mechanics' lien law shall be liberally construed with a view to effect their objects.

Appeal and Error—Review—Findings of Trial Court—Conclusiveness. The findings of a trial judge, who personally saw and heard the witnesses, will not be disturbed on appeal where the appellate court is not able to say that such findings are clearly not supported by the weight of the evidence, even if contrary to the majority of the witnesses.

Appeal and Error—Right to Review—Waiver of Error—Consent. An allowance of an attorney's fee of $75 upon decreeing foreclosure of a lien for $86 will not be disturbed on appeal, where the parties had stipulated that, in the event the court should find in favor of the plaintiffs, or either of them, the attorney's fee allowed should be $75.

Appeal and Error—Determination—Liability of Trustee—Judgment—Reformation. A decree foreclosing mechanics' liens against a bankrupt corporation's estate is not invalid as a personal judgment against the trustee in bankruptcy, merely from the fact that it reads against an individual "as trustee for said corporation," when from a reading of the whole decree it is evident no personal judgment was intended; but, in the interest of certainty, it should be amended to read "against the estate and assets" of the bankrupt.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered April 11, 1914, upon findings in favor of the plaintiffs, in an action to foreclose mechanics' liens, tried to the court. Affirmed.

L. A. Merrick and *C. H. Graves*, for appellants.

E. T. Bascom and *Coleman, Fogarty & Anderson*, for respondents.

[1]Reported in 147 Pac. 421.

HOLCOMB, J.—Respondent Bradley entered into an oral contract with the Donovan-Pattison Realty Company, a corporation, to paint, stain the shingles of the roofs, put heavy paper on the inside, paper the walls, and paint and shellac the floors and porches of four houses belonging to said corporation, in the month of August, 1912. The agreed price for each of said houses was $127. The respondent Trabont entered into an oral contract with said corporation in the month of August, 1912, to clear, grade, fill in, and otherwise improve a certain tract or parcel of land about 309 by 390 feet in area, for the sum of $300. Bradley filed two liens against the property upon which he furnished material and performed labor, the first being filed June 16, 1913, against two of the houses and tracts of land, one for the amount of $112, and one for the amount of $112.65, the second of his liens being filed June 19, 1913, against one of said houses and tracts of land for the sum of $94.30. Trabont filed one lien on July 3, 1913, for a balance of $258. Bradley's lien first filed declared that the furnishing of the labor and materials thereunder commenced on the 25th day of September, 1912, and ceased on April 14, 1913. His second lien declared that the furnishing of the labor and materials commenced on September 4, 1912, and ceased on June 14, 1913. Trabont's lien declared that the furnishing of labor and materials commenced on August 27, 1912, and ceased on July 3, 1913.

After the commencement of the furnishing of the labor and materials by each of these lienors, and on September 30, 1912, the corporation gave a mortgage upon the premises to one Eclista Pattison, which was recorded on October 1, 1912; also a mortgage to one Vanasdlen on October 2, 1912, recorded on October 7, 1912; and also a mortgage to one Dubuque on September 9, 1912, recorded on September 20, 1912. On August 30, 1913, the Donovan-Pattison Realty Company was duly adjudicated a bankrupt, and on September 15, 1913, the appellant Merrick was duly elected and

qualified as trustee of said bankrupt. The defendants Keating and wife, subsequently to the commencement of the labor by Trabont, purchased from the Donovan-Pattison Realty Company a portion of the tract or tracts upon which Trabont performed labor under his lien. The appellants' defense was that respondents had lost their lien rights by reason of their failure to file their notices of lien within the time prescribed by law, to wit, within ninety days after the cessation of the performance of the labor and the furnishing of the materials for which the liens were claimed. The court made findings of fact and conclusions of law, sustaining the Bradley liens as to two of the houses for the amounts claimed, but denying his right to a lien as to one of the houses; sustaining the Trabont lien as to one house and one acre of land in connection therewith for one-third of the amount claimed, and denying his claim as to two acres of the tract included in his lien notice.

Sixteen errors are assigned by appellants, based upon the making and refusing to make findings of fact and conclusions of law. The principal contention on the part of appellants is that the lienors actually completed the labor and furnishing of materials under their respective contracts long before the time they alleged, and did not file their liens within ninety days thereafter. They also insist that whatever labor was done by the lienors within ninety days before the time when they filed their liens was immaterial, and was done only for the purpose of apparently extending the time for filing their liens. They, therefore, contend that the liens are invalid and should not be sustained as against the mortgagees, who are incumbrancers, and that these claims should take equal right only with those of general creditors of the bankrupt estate.

We have examined the entire record in the case with great care. The evidence clearly shows that there was no limitation as to time when the furnishing of any of the labor and materials by either of the lienors was to be completed. Ap-

pellants insist that to uphold the liens, the work must have continued without cessation up to within ninety days prior to the filing of the lien. Our statute, Rem. & Bal. Code, § 1132 (P. C. 309 § 61), provides that "the liens created by this chapter are preferred to any lien, mortgage or other encumbrance which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given," and Rem. & Bal. Code, § 1147 (P. C. 309 § 89), provides that "the provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects." In *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851, this court held that the furnishing of three panes of glass on August 18, where it did not appear that the furnishing thereof was deferred fraudulently merely for the purpose of extending the time for filing the lien, but was a necessary element of performance of the contract, was sufficient to warrant the filing of a lien on October 14, where the last previous furnishing of material was on June 2 preceding. The evidence is sharply in conflict, but the testimony of some of the employees who had done work for the lienors upon these contracts shows that, as to the Bradley liens, substantial work was performed and materials furnished about April 12 and 14, 1913, and thus within ninety days prior to the filing of the liens; that, as to the Trabont contract, substantial work was done throughout March and April of 1913; and that as to the tract on which the court allowed the lien in favor of Trabont, he and another man worked thereon a day just prior to the filing of the lien.

The court disallowed the Trabont lien as to two acres purchased by Keating, upon the finding that the clearing and grading had been done upon these two acres more than ninety days previous to the filing of the lien, and that Keating was an innocent purchaser of the two acres as to Trabont's right of lien. It is not necessary that the work should

have continued uninterruptedly from the time it commenced until the time it ceased. A temporary cessation of work, where the design of the performance is not abandoned and work subsequently resumed and prosecuted without any substantial change in the plan, will not prevent the relation back of the lien to the time of the original commencement. 27 Cyc. 217; *Rieflin v. Grafton, supra.*

An examination of the testimony as shown in the record does not disclose anything that would justify this court in arriving at a different conclusion from that reached by the trial court, even though the number of witnesses in favor of the respondents was less than the number in favor of appellants. The findings of the trial court, who personally saw the witnesses, heard them testify, observed their conduct and demeanor while testifying, and weighed their interest and motives and the probabilities of the truthfulness of their testimony, will not be disturbed on appeal where this court is not able to say that such findings are clearly not supported by the weight of the evidence. *Columbus Varnish Co. v. Seattle Paint Co.*, 77 Wash. 245, 137 Pac. 434; *Nelson v. Walker*, 78 Wash. 353, 139 Pac. 31; *Thompson Co. v. Murphine*, 79 Wash. 672, 140 Pac. 1073; *Bogle v. Devlin*, 81 Wash. 50, 142 Pac. 433.

Appellants contend, however, that as to the Trabont lien, there was a settlement in full between the company and Trabont on about March 13, 1913. As to this, again, there is a sharp conflict between the appellants and Trabont. The latter testifies that it was a partial settlement, and that the two notes given him for $50 each were given him for the purpose of assisting him in furnishing powder and paying his living expenses while proceeding with the work. The notes were not paid, but are among the liabilities of the insolvent corporation. There is testimony on behalf of respondents that the officer of the company who claimed to have made the settlement with Trabont admitted to one of the attorneys for respondent, about the time the liens were

filed, that the Trabont lien and claim were good. We do not feel justified in reversing the findings and decision of the trial court upon these facts. From an examination of the entire record, we believe that the trial court reached as nearly substantial justice as could have been arrived at in the matter, and that the judgment should not be disturbed.

Appellants also complain of the allowance of an attorney's fee of $75 on a decree of foreclosure of the lien of Trabont for the sum of $86. The parties stipulated in the record at the trial, that "in the event the court should find in favor of the plaintiffs, or either one of them, the attorney's fee allowed shall be $75." In view of this stipulation, and the court having found for said plaintiff in a substantial amount, appellants cannot be heard to dispute the attorney's fee stipulated, and the allowance will not be disturbed.

Appellants contend also that the judgment as to Merrick, the trustee of the bankrupt estate, is invalid. We do not understand that the judgment of the court below against Merrick was intended as a personal judgment, but only a judgment against the entire estate, and especially against the real estate upon which the liens attach, in so far as the bankrupt and the trustee in bankruptcy are concerned. Of course, it would not be valid as a personal judgment against the trustee. From a reading of the terms of the decree we do not consider it was so intended. It may be modified, however, in the interests of certainty, so that, in each instance where the decree reads against L. A. Merrick, as trustee for said corporation, it shall read "as to the estate and assets of said Donovan-Pattison Realty Company, a corporation, bankrupt."

In all other respects the decree is affirmed, with costs to respondents.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

[No. 12440. Department Two. April 5, 1915.]

MRS. M. L. REYNOLDS, *Respondent*, v. TOWN OF COSMOPOLIS *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — INJUNCTION — REMEDY AT LAW. The granting of a permanent injunction at the suit of a property owner against the letting of a contract for a public improvement was not warranted, where the property owner had an adequate remedy under the statutes (3 Rem. & Bal. Code, §§ 7892-21, 7892-22), giving a right to file an objection to the assessment roll, and, in the event of its overruling by the city authorities, granting the right of appeal to the superior and supreme courts.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—LIMITATION. The statutory provision that the estimated cost of a proposed improvement initiated by resolution shall not exceed fifty per cent of the valuation of the real estate exclusive of improvements thereon, being limited to cities of the first class (3 Rem. & Bal. Code, § 7892-12), is of no avail as to cities other than the first class.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 25, 1914, in favor of the plaintiff, in an action to enjoin the execution of a contract for a public improvement, tried to the court. Reversed.

Stewart & Tucker and *A. Emerson Cross*, for appellants.

W. H. Abel and *Karl R. Gilmer*, for respondent.

MAIN, J.—The purpose of this action was to secure a permanent injunction against the letting of a contract for a local improvement by the defendant town acting through its proper officers. After a trial, a permanent injunction was granted. The defendants appeal.

The facts are in substance as follows: On March 25, 1914, the city council passed a resolution declaring its intention to improve "G" street, in the town of Cosmopolis, for a distance of six blocks. This improvement would extend from the principal business street outward. The pro-

[1]Reported in 147 Pac. 407.

posed improvement was to consist of a concrete roadway twenty feet wide, and concrete sidewalks. Protests were filed against the proposed improvement by the owners of less than 50 per cent of the property within the proposed district. On April 15, 1914, a hearing was had upon the protests. On April 22, 1914, the council passed an ordinance providing for the improvement. The aggregate assessed value of the real estate, exclusive of improvements, embraced within the proposed district, was $6,700. This valuation represented 40 per cent of the actual value placed upon the property for the purposes of general taxation, the actual value being $16,750. The city engineer's estimate of the cost and expense of the proposed improvement was $20,643. Upon opening the bids, it appeared that the entire cost of the improvement would be $15,535.30. According to the resolution and the ordinance, the cost of the improvement was to be assessed against the abutting property according to the zone system, as provided for in the local improvement code, Laws of 1911, ch. 98, pp. 441, 446, § 13 (3 Rem. & Bal. Code, § 7892-13).

Upon the trial, certain property owners within the district testified that they did not desire the improvement. Certain others testified that they were in favor of the improvement. There are general expressions in the testimony that the property within the district will not be benefited by the improvement. There are other general expressions that the property within the district will be benefited substantially by the improvement. This action was brought by one of the property owners only, claiming, however, in the complaint, to bring it in behalf of all the other property owners similarly situated. The evidence as to the specific value of the property and the specific amount of the benefits that would accrue to any particular tract of property by reason of the improvement was confined largely to three lots owned by the respondent. These three lots, aside from the improvement, were of the approximate value of eight or nine hundred dollars. The amount which these lots would be as-

sessed for the improvement was $522. The average cost of the improvement per lot of all the property within the district would be $133.92.

The respondent claimed that her property would not be benefited by the improvement, and that the action of the city council in ordering the improvement for the cost of which she would be assessed $522 was arbitrary. The trial court made no statutory findings of fact, but filed a memorandum decision in which it was stated that the value of the improvement to the respondent's property would be from $100 to $150; and concluded that, since the assessment would be a much larger sum than this, the council had acted in an arbitrary manner in ordering the improvement.

The controlling question in the case is: Assuming that the respondent's property would be assessed for more than it would be benefited by the improvement, should the injunction have been issued restraining the city council from proceeding with the improvement? The local improvement code provides a method by which objections to the assessment roll may be filed, and in the event they are overruled by the city council, a right of appeal to the superior court is given, and from the superior court to this court. We think the respondent had an adequate remedy under the statute, which gives the right to file objections to the assessment roll, and an appeal therefrom. If the respondent has rights which are being invaded by the amount of the proposed assessment upon her property, they can be fully and adequately protected by means of the appeal provided by the statute. It would seem reasonably plain that one property owner within a district, even though her property would be assessed for a sum greater than the benefits which it would receive, should not, for this reason, prevent the prosecution of the entire improvement.

Something is said in the briefs about the cost of the improvement being greater than fifty per cent of the assessed value of the real estate within the district. But the section

of the code which provides that the estimated cost of a proposed improvement when it is initiated by resolution shall not exceed fifty per cent of the valuation of the real estate exclusive of improvements thereon within the proposed improvement district according to the valuation last placed on it for the purpose of general taxation, is limited to cities of the first class. The town of Cosmopolis not being a city of the first class, does not come within this provision.

The judgment will be reversed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12628. Department Two. April 5, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Adam Jakubowski et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.[1]

HOMESTEAD — DECLARATION OF HOMESTEAD — EXECUTION. Under Rem. & Bal. Code, § 529, a declaration of homestead must be filed prior to the date of execution sale of the premises, in order to preserve a homestead right as against an execution purchaser.

CERTIORARI—APPLICATION FOR WRIT—TIME. An application for a writ of certiorari to review a decree of foreclosure is not timely when made more than ninety days subsequent to the entry of the decree, since it must be made within the time limited for appeals from judgments.

Application filed in the supreme court February 8, 1915, for a writ of certiorari to review proceedings of the superior court for King county, Mitchell, J. Denied.

Vince H. Faben, for relators.

Jay C. Allen, for respondent.

MAIN, J.—This is an original application in this court for a writ of certiorari. On January 23, 1911, the relators

[1]Reported in 147 Pac. 408.

made, executed, and delivered to one Joseph Kraus a mortgage upon certain real estate in King county, Washington, to secure the principal sum of $2,500; and on January 4, 1912, a second mortgage between the same parties and upon the same real estate was executed to secure the principal sum of $500. On May 19, 1914, the mortgagee, Joseph Kraus, filed his complaint in the superior court for King county praying for a foreclosure of both mortgages, and also,

"That the said plaintiff, or any of the other parties to this suit may become a purchaser at such sale, and that the sheriff issue a deed to such purchaser, and that such purchaser be let into the immediate possession of said premises upon the confirmation of such sale by the court herein."

The relators, in their amended answer to the complaint in foreclosure, set up affirmatively that they claimed the premises covered by the mortgages as their homestead. The plaintiff, by reply, denied the affirmative matter pleaded in the amended answer. On the issues framed, the trial court, on October 10, 1914, made findings of fact and conclusions of law in favor of the plaintiff, and among other things concluded:

"That any party to this action may become a purchaser at said sale, and that the purchaser be let into the immediate possession of the premises."

On the same date, a decree of foreclosure was entered and, in the same language as heretofore quoted, it was decreed that the purchaser be let into the immediate possession of the premises.

On November 28, 1914, the sheriff of King county sold the premises described in the mortgages to Joseph Kraus, the plaintiff, who demanded of the relators the immediate possession, which they refused. On December 12, 1914, an order confirming the sale was entered. On December 30, 1914, the plaintiff filed in the superior court his petition for a writ of assistance. On the same day, the court entered an order directing that a writ of assistance issue to the sheriff

of King county to put the plaintiff and Pasquale Picardo, who had obtained an interest in the property from the plaintiff under the certificate of purchase, into possession of the premises. The writ was on the same day issued. On January 4, 1915, the relators filed in the superior court their petition wherein they prayed that the writ of assistance be quashed and that they be allowed to remain in the possession of the premises during the year provided by law for the redemption thereof. Thereupon an order was entered fixing January 8, 1915, as the date for hearing the petition to quash the writ of assistance, and pending the hearing the writ was recalled and the sheriff ordered to withhold execution thereunder.

On January 4, 1915, a written declaration of homestead, signed by the relator Anna Jakubowski, wherein the premises involved were claimed as the homestead of the relators, was filed for record in the office of the county auditor for King county. On February 2, 1915, the petition to quash the writ of assistance having been heard, the superior court ordered that the restraining order theretofore issued against the writ of assistance be set aside and held for naught, and that an alias writ of assistance forthwith issue and be by the sheriff executed, placing the plaintiff Joseph Kraus and Pasquale Picardo in possession of the premises. Thereafter, and on February 8, 1915, the relators filed in this court their petition for a writ of review.

There are two possible theories upon which this application may be based. One is for the purpose of establishing the right of the relators to occupy the premises as a homestead during the redemption period, based upon the declaration of homestead filed on January 4, 1915. The other is that the application is for the purpose of reviewing the judgment of foreclosure entered on October 10, 1914. If the application be construed as one for the purpose of establishing rights under the declaration of January 4, 1915, the writ must be denied because this declaration was filed subse-

quent to the sale. In order to preserve a homestead right as against a purchaser on execution, it is necessary that the declaration of homestead be filed prior to the date of the sale. Rem. & Bal. Code, § 529 (P. C. 81 § 863); *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070; *Ross v. Howard*, 25 Wash. 1, 64 Pac. 794; *In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270.

On the other hand, if the application for a writ of review is to review the judgment of foreclosure entered on the 10th day of October, 1914, the application is not timely. The application being filed on February 8, 1915, was made more than ninety days subsequent to the entry of the judgment. An application for a writ of review must be made within the time fixed by statute for an appeal from such judgment. *State ex rel. Lowary v. Superior Court*, 41 Wash. 450, 83 Pac. 726; *State ex rel. Alexander v. Superior Court*, 42 Wash. 684, 85 Pac. 673; *State ex rel. Tumwater Power & Water Co. v. Superior Court*, 56 Wash. 287, 105 Pac. 815.

The writ will be denied.

MORRIS, C. J., ELLIS, CROW, and FULLERTON, JJ., concur.

[No. 12641. Department Two. April 5, 1915.]

ALBERT SCHOOLEY, *Appellant*, v. THE CITY OF CHEHALIS *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT—WATER SYSTEM. Art. 8, § 6, of the state constitution prohibiting municipal indebtedness in excess of five per cent of the taxable property, excepting that, in case of municipally owned water, light and sewer systems, it may incur an additional five per cent indebtedness, with the assent of three-fifths of the voters, does not contemplate that the excess of indebtedness for general purposes, which is void under the constitution, should be taken into account as a limitation on the indebtedness for a water system, since the constitution expressly authorizes indebtedness to the extent of five per cent of the assessed valuation for the purpose of purchasing, owning, and controlling such utilities as water systems.

MUNICIPAL CORPORATIONS—BONDS—ISSUANCE—SUBMISSION TO VOTERS—RATE OF INTEREST. A proposition for a bond issue by a city submitted to the voters thereof, in which the bond interest was stated as "at a rate not exceeding six per cent per annum," following the language of Rem. & Bal. Code, § 8007, is sufficient without fixing a definite rate of interest, as such bonds are the subject of competitive bids in the open market and it is common practice for a bidder to state the rate of interest which he is willing to accept.

MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL OF AMENDING ORDINANCE. An ordinance which expressly re-enacts in amended form a section of an original ordinance which had been amended, and then repeals the former amendatory ordinance, does not thereby repeal the original section with the elimination of the amendatory ordinance.

MUNICIPAL CORPORATIONS—BONDS—PROPOSITION—USE OF PROCEEDS. A proposition for the issuance of bonds for the purchase and maintenance of a water system is not illegal as contemplating the use of the proceeds of the bonds for maintenance purposes, in violation of the provision of Rem. & Bal. Code, § 8008, which provides that the maintenance of such a system shall be paid out of the revenues of the plant, since it will not be presumed that the city will do an illegal act, or that it will not perform its duty by fixing rates so as to maintain the plant from its revenues.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT. A contract by a city to purchase a private water system as part of a municipal

[1]Reported in 147 Pac. 410.

plant does not create a general indebtedness, when the contract expressly provides that the cost shall not be a general obligation of the city, but shall be made a charge upon the revenues of the water system, and payable in semiannual installments.

MUNICIPAL CORPORATIONS — BONDS — PROPOSITION — MATURITY. A proposition for the issuance of bonds payable in twenty years, with an option to make payment at any time after ten years, is not open to the objection that the date of maturity is indefinite.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 18, 1915, upon sustaining a demurrer to the complaint, in an action to enjoin the issuance of bonds for a public improvement, after a trial to the court. Affirmed.

Peters & Powell, for appellant.

W. A. Reynolds, for respondents.

CROW, J.—Action by Albert Schooley, a taxpayer, against the city of Chehalis, a municipal corporation, and its officers, to restrain the issuance of bonds of the par value of $185,000. A demurrer was sustained to the complaint, and the plaintiff, refusing to plead further, appeals from an order of dismissal.

The bonds which are the subject-matter of this litigation are the same bonds and involve the same proceedings which were considered by this court in *Washington-Oregon Corporation v. Chehalis*, 76 Wash. 442, 136 Pac. 681. On March 25, 1912, the city enacted ordinance 14A, submitting to the voters a proposition to acquire, own, and operate a system of water works at an estimated cost of $185,000. For this purpose the ordinance proposed an issue of bonds, $70,000 thereof to constitute a part of the general indebtedness of the city, and $115,000 thereof to be special fund bonds payable solely out of the gross revenues of the system. The ordinance further provided for the creation of two special funds to be known as (a) the Newaukum River Gravity Water System of Chehalis fund, and (b) the Newaukum River Gravity Water System of Chehalis Bond

fund; that into fund (a) all proceeds of the bonds, when sold, and the entire revenues of the new water system were to be paid, together with such other funds as the city might see fit to transfer thereto; that from fund (a) should be paid the entire cost of acquiring, constructing, and maintaining the water system; that there should be set aside from fund (a) into fund (b), at specified times, sums sufficient to pay annual interest on the special fund bonds and also the principal of such bonds as they matured; that fund (b) should be used solely for the purpose of paying the principal and interest of the bonds issued against the water system, and that such bonds should be a first and direct lien on the entire gross revenues of the water system. The ordinance further provided that the city should not sell, lease, or in any other manner dispose of the water system, until all bonds issued against its revenues should be paid.

The complaint, after alleging the above facts, shows that the election was regularly held; that the bonds were voted by the required number of electors, and in paragraph 5, in substance, further alleges, that on the 21st day of April, 1913, ordinance 39A was passed, which amended § 8 of the original ordinance 14A of March 25, 1912, in the following particulars: (1) That the original ordinance contained the following language: "and from the said Newaukum River Gravity System of Chehalis fund shall be paid the entire cost and expense of acquiring, constructing, and maintaining said Newaukum River Gravity Water System as specified and set forth in this ordinance and additions thereto, including all lands and the condemnation thereof, *together with the special bonds issued upon and against said fund, and the interest thereon;*" that in the amended ordinance the italicized language above mentioned is omitted. (2) That the other amendments and additions to that portion of § 8 are as follows, the amendatory language being italicized:

"There shall be set aside from the Newaukum River Gravity Water System of Chehalis Fund into the Newaukum

River Gravity Water System of Chehalis Bond Fund on the 20th day of each and every month after the issuance of such bonds *of and from the gross revenues of said Newaukum River Gravity Water System* a sum equal to one-sixth of the interest on the entire bond issue which sum so set apart shall be used for the purpose of paying the semi-annual interest as provided for in this ordinance. Provided, however, that after the year in which the first part of the principal is paid as provided for in this ordinance then only so much interest shall be set apart on the 20th day of each and every month as shall be necessary to be paid on the remaining principal, the amount of interest to be so set apart to be likewise reduced upon each payment of principal as provided for in this ordinance. There shall also be set apart from the said 'Newaukum River Gravity Water System of Chehalis Fund' into the 'Newaukum River Gravity Water System of Chehalis Bond Fund' on the 20th day of each and every month after the issuance of such bonds for a period of five years in addition to the amounts last above specified to be set apart for interest, a sum equal to one-sixtieth part of the bonds which will mature at the end of the first five year period, such sum so set apart *into a said bond fund solely from the gross revenues of the municipal water system herein created* to be used for the purpose of taking up and cancelling such maturing bonds. And on the 20th day of each and every month thereafter there shall be set apart from the said 'Newaukum River Gravity Water System of Chehalis fund' into the 'Newaukum River Gravity Water System of Chehalis Bond Fund' *solely from the gross revenues of the municipal water system herein created* a sum equal to one-twelfth of the amount of principal and interest of so much of such bonds as shall mature in each and every year after the first five year period as provided for in this ordinance until all of such bonds and interest shall be paid. *Provided, however, that the interest and principal of the $115,000.00 special water fund bonds shall be paid first, as the same mature, out of the funds provided to be set aside into said bond fund from the gross revenues of said water plant.*"

The complaint further alleges that thereafter, on the 20th day of July, 1914, the city passed ordinance No. 98A, which was entitled: "An ordinance to amend section 1 of ordinance

No. 39A, amending section 8 of ordinance No. 14A, entitled . . . passed and approved the 21st day of April, 1913, and to repeal ordinance No. 39A;" that § 1 of ordinance No. 98A in substance provides as follows:

"That section 1 of Ordinance No. 39A entitled as aforesaid, amending section 8 of Ordinance No. 14A, passed and approved the 25th day of March, 1912, as amended by Section 1 of said Ordinance No. 39A, be amended to read as follows: Section 8: [Here is inserted the language of section 8 which appears in the original ordinance No. 14A with a few verbal changes not affecting the sense except that the following changes in sense occur: Section 8 as set out in ordinance 98A provides that the coupons of the water system bonds shall be signed by the lithographed signatures of the mayor and clerk. Section 8 in the original ordinance No. 14A provided that there shall be set aside from the Newaukum River Gravity Water System of Chehalis Bond Fund on the 20th day of each and every month a sum equal to one-sixth of the interest on the entire bond issue. The language of section 8 as it is reenacted in Ordinance No. 98A provides that the moneys so to be set aside from the Newaukum River Gravity Water System of Chehalis Fund into the bond fund shall be taken 'from the gross revenues of such water system;']"

and that § 2 of ordinance 98A reads as follows:

"That Ordinance No. 39A, passed and approved the 31st day of April, 1913, be and the same is hereby repealed."

The complaint further alleges, that the respondents are about to issue the bonds in compliance with said ordinances; that at the time when the city election was held, the total taxable property of the city, according to the last previous assessment, was valued at $1,507,595 and no more; that the net outstanding general indebtedness was then $73,293.49; that at the time of the commencement of this action the total taxable property of the city, according to the last assessment previous thereto, was valued at $1,572,000 and no more, and that the net outstanding general indebtedness was then $82,-

845.60. The complaint further shows that on or about June 29, 1914, the respondent city entered into a written contract with H. C. Coffman and T. C. Rush, for the purchase of certain lands, property and franchises which comprised an existing water system then in use in the city, for the consideration of $30,000, $11,000 to be paid in Newaukum River Gravity Water System bonds, and the remainder of $19,000 to be paid at the rate of $1,000 every six months in cash without interest, or in water system bonds, as the city might elect, such payments to be made from the revenues of the water system; that on January 7, 1914, the defendant city entered into a contract with one W. H. Mitchell for the construction of a pipe line, reservoir, and distributing system, it being agreed that he should accept as pay therefor the $70,000 of general bonds to be issued under ordinance No. 14A, and such proportion of the $115,000 of special bonds to be issued under ordinance No. 14A as might be necessary to fully pay his contract price; that he completed his contract at the agreed cost of $170,534.92, and that the city is now about to execute and deliver to him the above mentioned general bonds to the amount of $70,000, and special water fund bonds above mentioned in the sum of $100,534.92.

Appellant's first contention is that the issuance of $70,000 of the general bonds will cause the city indebtedness to exceed the constitutional limit, and that in determining whether such limit is exceeded, the financial condition at the date of the issuance of the bonds, and not at the date when they were authorized by a vote of the people, must be considered. It must be remembered that these bonds are to be issued to purchase a water system to be owned and controlled by the city. The complaint shows the indebtedness of the city to have been greater at the time of the filing of the complaint when the bonds were about to be issued than at the date upon which they were voted by the people.

Without deciding the question which shall be controlling, we will consider the indebtedness of the latter date, it being the larger. The value of taxable property was then $1,572,000, and the complaint shows that the net total of the general bond and warrant indebtedness was then $82,845.60, which would be $4,245.60 in excess of the five per cent limit allowed by the constitution of this state. There is no allegation that any of this existing indebtedness was contracted in purchasing any works for supplying water, light, or sewers to be owned by the municipality. Although § 6 of art. 8 of the constitution prohibits a municipal corporation from incurring a debt for general purposes in excess of five per cent of the taxable value of the property of the city, it provides that the city, with the assent of three-fifths of the voters therein voting, may become indebted to a larger amount, not exceeding five per cent additional, for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality. The issuance of the contemplated $70,000 general fund bonds to purchase a water system does not exceed five per cent of the assessed value of the property of the city at the time the bonds were to be issued. It is a fact, however, that the $70,000 added to the existing general indebtedness would exceed ten per cent of such assessed valuation. But we cannot conclude that this fact would make the bonds now to be issued illegal or void. If the city, in violation of the constitutional inhibition, has heretofore incurred general indebtedness in excess of five per cent of its assessed valuation, such excess is invalid and void. The fact, however, that such excess of invalid and void general indebtedness has been incurred will not deprive the city of its right to issue bonds to the amount of five per cent of its assessed valuation for the purpose of purchasing a water system to be owned and controlled by it. In other words, it was the manifest intention of the framers

of the constitution, and the people in its adoption, that a city should be authorized to incur an indebtedness to the extent of five per cent upon the assessed valuation of its property, for the purpose of purchasing, owning, and controlling such a system. The existing general indebtedness is an independent and separate matter, and if it has been incurred in excess of the constitutional limit, such excess indebtedness could not be enforced, neither could it be validated by a vote of the people. *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873; *Patterson v. Edmonds*, 72 Wash. 88, 129 Pac. 895.

Appellant's next contention is that the respondents are not authorized to issue the bonds either general or special, because the proposition submitted to the people did not specify the rate of interest which they should bear. The proposition in ordinance 14A was that both classes of bonds should bear interest "at a rate not exceeding six per cent per annum." This is the language of the statute. Rem. & Bal. Code, § 8007 (P. C. 77 § 1077). Appellant contends that it is insufficient as the rate should be definitely fixed by the ordinance. In support of this contention, appellant cites *Hansard v. Green*, 54 Wash. 161, 103 Pac. 40, 132 Am. St. 1107, 24 L. R. A. (N. S.) 1273, where this court said:

"There is another reason that would compel a reversal of this case in any event. The law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification or rejection. The ordinance before us goes no further than to recite the advisability of purchasing the existing water works system, and that 'said town become indebted and issue its bonds as provided by law in the sum of twenty-two thousand ($22,000) dollars, for the purchase of such water works.' The plan or system is not set out. The time the bonds are to run, the rate of interest, the manner of payment, are all matters proper to be considered, and, without some mention thereof, the taxpayer cannot vote with that understanding contemplated by the statute. Payment is as much a part of the 'plan or system' as is the purchase, and a method should be provided in the ordinance. Otherwise the voter has ex-

pressed his opinion upon a part only of the object sought to be attained."

This statement, which was made in passing upon the city ordinance then under consideration, has no application to the ordinance now before us. We have examined the original record in *Hansard v. Green* and find that the only reference made to the proposed bonds was in the following language:

"Be it further ordained that said town [Harrington] become indebted and issue its bonds as provided by law in the sum of twenty-two thousand ($22,000) dollars, which is the cost of the system as near as the same may be estimated."

It thus appears that the Harrington ordinance utterly failed to meet the requirements of the statute, in that it made no reference whatever to any rate of interest, the time the bonds were to run, or the manner of payment. Municipal bonds are ordinarily the subject of competitive sale in the open market. It is common knowledge that such competition is generally made by the bidder stating the rate of interest, not exceeding that permitted by law or ordinance, at which he will purchase, and it seems to us that a statement that the rate of interest shall not exceed six per cent gives such an opportunity for competitive bidding as will enable the city to sell the bonds to the best advantage, and that it also meets the demands of the statute.

It is further contended that the city has not made any provision for creating a special fund from revenues of the water system with which to pay the special bonds for $115,000, as required by Rem. & Bal. Code, § 8008 (P. C. 77 § 1078). This contention seems to be based upon the proposition that ordinance 14A, which was passed March 25, 1912, was amended on April 21, 1913, by ordinance 39A as above stated; that thereafter, on July 20, 1914, the city passed ordinance 98A, by § 1 of which ordinance 39A was amended. Appellant calls attention to the fact that § 2 of 98A entirely repeals ordinance 39A, and argues that the net result of this procedure was to entirely eliminate § 8 of

original ordinance 14A so that it no longer exists either in its original form or as amended, and that as § 8 made the only provision for creating the special fund, the repeal destroys such provision so that it no longer exists. In support of this contention appellant, citing *People v. Wilmarding*, 136 N. Y. 363, 32 N. E. 1099; *People v. Supervisors*, 67 N. Y. 109, 23 Am. Rep. 94; and *Goodno v. Oshkosh*, 31 Wis. 127, insists that ordinance 98A did not, by repealing ordinance 39A, reinstate original section 8 of ordinance 14A. The cases cited announce the doctrine that, where a statute or a section has been amended by a subsequent act, such subsequent act supersedes and impliedly repeals the original section or act thus amended, and that if the amendatory act be thereafter repealed, such repeal does not revive the original act. It is apparent that the cases cited have no application, as the last amendatory ordinance now under consideration expressly reenacted § 8 in an amended form. Section 8 as thus amended is in full force and makes provision for the creation of the fund.

Appellant further contends that the proposition submitted by ordinance 14A was unauthorized and illegal, for the reason that it authorized the issuance of bonds a part of the proceeds of which should be used for the purpose of maintaining the water system. We find no merit in this contention. The fund (a) created by the ordinance was to be used to purchase and maintain a water system, but it will be observed that the gross receipts from the system were to be paid into that fund and, as suggested by this court in *Washington-Oregon Corporation v. Chehalis*, *supra*, it would not be assumed that the municipal authorities will at some time in the future do an illegal act by maintaining the system out of the proceeds of the bonds authorized to be sold under the system. We also said:

"Nor is there, so far as we can observe, any difficulty in determining the amount of money in the first fund derived from the revenues of the plant that should be segregated

from this fund and transferred to the second fund. The first fund is merely a collection fund. It will not be a difficult matter to segregate the money that should be transferred into the second fund; and when so segregated and transferred, a fund is created out of which the special bonds are payable as provided by law. We, therefore, cannot concur in the conclusion of the court below that the portion of the ordinance creating this second fund is invalid."

Rem. & Bal. Code, § 8008 (P. C. 77 § 1078), provides that the maintenance of the system shall be paid out of the revenues of the plant. In the event that the rates established are not sufficient to maintain the plant and pay the interest and principal of the bonds, as the same mature, the city is bound to raise the rates until the revenues will be sufficient to maintain the system and also take care of the maturing principal and interest of the bonds. We will not presume that the city will not perform this duty by fixing such rates as will enable it to maintain the plant from the revenues of the system itself, and also pay the principal and interest of the bonds as provided by the ordinance.

Appellant further contends that the money which the city has contracted to pay to Coffman and Rush for the purchase of the old water system is an indebtedness of the city, and that, when the same is considered in connection with the existing indebtedness, it will exceed the constitutional limit. The contract between Coffman and Rush and the city, which is set forth in the complaint, provides that the $19,000 shall not be a general obligation or debt of the city, but that it shall be made a charge upon the revenues of the water system, and shall be paid in installments of $1,000 every six months without interest. In view of this provision, the obligation thus incurred is not a general indebtedness of the city. *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895.

Some argument is made to the effect that the date of the maturity of the $70,000 of general bonds is indefinite. We

find no merit in this contention. Without stating in detail the provisions of the ordinance, we state our conclusion that the bonds are payable in twenty years with an option to make payment at any time after the expiration of ten years. This is sufficient.

Other contentions of less importance have been made in the brief, of which the length of this opinion forbids a review. We will say, however, that after careful consideration we find them to be without merit. The complaint does not state a cause of action. The demurrer was properly sustained, and the judgment is affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and MAIN, JJ., concur.

[No. 12369. Department One. April 6, 1915.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. J. B. TILLOTSON *et al.*, *Respondents*.[1]

MASTER AND SERVANT — RELATION — INDEPENDENT CONTRACTORS — COUNTIES — LIABILITY TO THIRD PERSONS — COMPLAINT. Under the rule that the principal is liable for the acts of an independent contractor, when the character of the work is inherently and intrinsically dangerous, a complaint by a railway company against a county states a cause of action when it alleges that the county let a contract for the construction of a state road knowing that it was inherently dangerous and would result in damaging plaintiff's right of way, tracks and telegraph wires adjacent thereto, and in endangering the operation of the trains; that the contractor, under plans and specifications given by the county, used explosives for the purpose of removing stones and stumps, throwing stones, stumps, etc., across the right of way, railway tracks and telegraph wires; and that he felled trees in such a negligent manner as to allow them to fall onto and across the right of way, railway tracks and telegraph wires of plaintiff; the methods employed being contemplated, and sanctioned, and acquiesced in by the county, which at all times had knowledge of the methods whereby the contract was being completed, and at all times during the construction of said highway controlled the manner of doing the work.

[1]Reported in 147 Pac. 423.

Appeal from a judgment of the superior court for Pacific county, Holcomb, J., entered August 4, 1914, upon sustaining a demurrer to the complaint, dismissing an action in tort. Reversed.

Geo. T. Reid, J. B. Quick, L. B. da Ponte, and *Robert G. Chambers,* for appellant.

H. W. B. Hewen and *Herman Murray,* for respondent Pacific County.

MOUNT, J.—This action was brought by the plaintiff to recover damages from the defendants on account of injuries to the right of way, railroad tracks, and telegraph wires of the railway company. The defendant Pacific county appeared separately and filed a demurrer to the complaint. This demurrer was sustained upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The plaintiff elected to stand upon the allegations of the complaint, and the action was dismissed as to Pacific county. The plaintiff has appealed.

The complaint, after alleging the incorporation of the plaintiff, alleges, that in July, 1911, the defendant Pacific county entered into a contract with Zindorf & Elliott, whereby they agreed to construct a part of state road No. 5 in Pacific county. A copy of the contract between Pacific county and Zindorf & Elliott is attached to the complaint and made a part thereof; that subsequently, Zindorf & Elliott, with the consent of Pacific county, sublet a part of the work to the defendant J. B. Tillotson, who in carrying out the contract for and on behalf of Pacific county, and as its agent under the terms of said contract, so negligently and carelessly performed and completed the contract, and particularly in the blasting and felling of trees in the building of said road, that the same fell upon and greatly endangered the plaintiff's telegraph wires, and endangered the operation of the trains of the plaintiff, and injured and damaged

the railroad track owned by the plaintiff, so that for the necessary protection of said telegraph wires and track and the operation of plaintiff's trains, it was forced to, and did, incur expense in the sum of $221.67.

After alleging that these expenses were reasonable, and that a claim therefor was presented to Pacific county and rejected, the complaint then states:

"That the defendant Pacific county, was engaged in the construction of that part of state road No. 5 described herein during the year 1911, and that the defendant Tillotson was the agent of the defendant Pacific county, and employed by it in constructing said highway at the points where the damage to plaintiff's property occurred; that at the time the defendant Pacific county entered into the contract which is hereto attached, and at the time they employed the defendant Tillotson to construct the highway herein described, the defendant Pacific county, and its officers, agents, and employees, including the defendant Tillotson, well knew that the construction of said highway according to the plans and specifications of said contract was inherently and intrinsically dangerous in and of itself and would necessarily result in damaging the plaintiff's right of way, railway tracks, and telegraph wires, adjacent thereto, and would necessarily result in endangering the operation of the plaintiff's trains; that the probable result of the construction of said highway according to the plans and specifications set forth and made a part of said contract, was at all times known to the defendant Pacific county, its agents, officers, and employees and to the defendant Tillotson; that the employer, Pacific county, at all times during the construction of said highway, controlled the manner of doing the work.

"That at the point where the injuries set forth in this complaint were sustained, state road No. 5 is in close proximity to the right of way, railway track, and telegraph wires of this plaintiff; that defendant Tillotson in constructing said roadway under the plans and specification as given him by defendant Pacific county, used explosives for the purpose of removing stones, stumps, and other material from said roadway and the natural, probable and reasonable results of the use of said explosives for such purposes was to throw stones, stumps, and trees onto and across the right of way, railway

tracks, and telegraph wires of the plaintiff; that in cutting down trees on the roadway the defendant Tillotson negligently and carelessly allowed said trees to fall onto and across the right of way, railway track, and telegraph wires of this plaintiff; that the methods employed by the defendant Tillotson in removing stones, stumps, and trees from the roadway was at all times contemplated by the defendant Pacific county, and the methods so used were sanctioned by Pacific county and its county engineer; that the methods and manner of the defendant Tillotson in constructing said state aid road No. 5 were the usual and customary methods of doing said work and were so known to be to the defendant Pacific county at the time the contract was entered into with the said Zindorf & Elliott, and at all the times during the progress of the said work, and was acquiesced in by the said defendant Pacific county, its officers, agents, and employees, who at all the times during the progress of said work had knowledge of the methods and means whereby said contract was being completed.

"That in the month of August, 1911, the plaintiff warned the defendant Tillotson and the defendant Pacific county, and the county engineer of Pacific county, Washington, that the manner in which the defendant Pacific county and the defendant Tillotson were prosecuting the work on the highway herein described was damaging the property of the plaintiff, and endangering the operation of its trains. That notwithstanding such warning, the defendants continued with the work of construction in the same manner, which construction work resulted in the damages hereinbefore set forth. That said damages were caused wholly by the manner in which the defendant Tillotson constructed said highway, and was done with the knowledge and consent of the defendant Pacific county, its officers, agents, and employees."

The trial court was of the opinion that the contract entered into between Pacific county and Zindorf & Elliott, and the subcontract let to the defendant Tillotson, constituted the defendant Tillotson an independent contractor. We have no doubt that the contract entered into between Pacific county and Zindorf & Elliott, upon its face constituted Zindorf & Elliott and the subcontractors independent contractors. The rule is well settled that the principal is not liable

for the acts of an independent contractor unless the character of the work to be performed is inherently and intrinsically dangerous. The rule is well settled in *North Bend Lumber Co. v. Chicago, M. & P. S. R. Co.*, 76 Wash. 232, 135 Pac. 1017, where, after considering many cases, we stated the rule as follows:

"A contractor to be independent must exercise an independent employment. He must be at liberty to perform the work he undertakes in his own way, at his own time within the limits of the time fixed in the contract, and by such means as to him seems most suitable. This does not mean, of course, that the contract itself may not prescribe that the work shall be performed in a particular manner, or that certain parts of it must be completed within a time less than the time fixed for the completion of the whole, or that certain means shall be employed in the accomplishment of the work, but it means that control over these matters must not be left to the whim or caprice of the employer, or his representative, to be exercised as the work progresses. If such right of control is retained, if the employer reserves to himself, or to his representative the right to control at his pleasure the manner and means by which the work contracted for is to be accomplished, if the employer may stand by and tell the person undertaking the work, where, when and how it shall be performed, such person is the agent and servant of the employer, and not an independent contractor. The employer may reserve to himself the right to judge of the result of the work, and may exercise this right as to the character of the work or as to the character of the materials used while the work progresses without destroying the independent nature of the contract, but matters of this kind mark the limits of his rights; they must relate to results, and not as to the means by which the results are accomplished."

In *Freebury v. Chicago, M. & P. S. R. Co.*, 77 Wash. 464, 137 Pac. 1044, we stated:

"But this general rule is subject to well settled exceptions. One of these is that, where the work to be done is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injury to third persons unless measures are adopted by which such consequences may be prevented,

an employer cannot evade responsibility by entering into an independent contract with another person for the doing of the work. In *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310, it is said:

" 'Where the work is inherently or intrinsically dangerous in itself and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, and in other like cases, a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work.' "

And in *Schade Brewing Co. v. Chicago, M. & P. S. R. Co.*, 79 Wash. 651, 140 Pac. 897, we again considered the rule first above quoted.

If we were to consider only the terms of the contract entered into between Pacific county and Zindorf & Elliott, we would be constrained to hold that the contract upon its face constituted the contractors independent contractors, for, under the terms of the contract, the contractors were authorized to perform the work in their own way without interference on the part of the county or the county engineer, except as to the result of the work. The eighteenth paragraph of the specifications, attached to and made a part of the contract, provides:

"If any work or service be required to be done which in the opinion of the engineer does not come within the class of work to be measured under the contract, he shall be at liberty to direct the contractor to perform the same by day's labor, and the contractor when required by him shall furnish such force and materials and perform such work in the manner directed, and he shall be paid the reasonable and actual wages of the men as ascertained by the time keeper and the actual value of all materials furnished, together with ten per cent of the total amount for the use of tools and profit. The engineer shall be at liberty to discharge any inefficient or unsuitable workman who shall be placed on such work, and the work so performed shall be subject to his approval before payment is made therefor."

But this provision of the contract relates only to the work specified in that paragraph. It does not apply generally to

the whole work under the contract. We are satisfied, therefore, that if we may look only to the terms of the contract entered into between Pacific county and the original or subcontractor, that these contractors are independent contractors for whose negligence the county would not be liable. But as we have seen above, the complaint alleges that the work to be done by the subcontractor "was inherently and intrinsically dangerous in and of itself and would necessarily result in damaging the plaintiff's right of way, railway tracks, and telegraph wires; . . . that the employer, Pacific county, at all times during the construction of said highway, controlled the manner of doing the work." It is apparent that these allegations of the complaint, which, for the purposes of the general demurrer must be taken as true, bring the case within the rule where the employer reserves to himself, or to his representative, the right to control the manner and means of doing the work. The person employed by him is his servant, and not an independent contractor. We are satisfied under the rule stated that this case is not controlled by *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1083, but is controlled by *North Bend Lumber Co. v. Chicago, M. & P. S. R. Co.*, and the subsequent cases herein cited, *supra;* and the complaint states a cause of action against Pacific county.

The judgment of the trial court must therefore be reversed, and the cause remanded for further proceedings.

MORRIS, C. J., PARKER, ELLIS, and CHADWICK, JJ., concur.

[No. 12198. Department Two. April 6, 1915.]

H. B. SCHROEDER *et al.*, *Appellants*, v. HOTEL COMMERCIAL COMPANY, *Respondent*.[1]

EVIDENCE—DEMONSTRATIVE EVIDENCE—ADMISSIBILITY—DISCRETION OF COURT. In an action for installments due on the price of an electric piano, in which there was a counterclaim seeking rescission of the contract on the ground of false and fraudulent representations in its procurement, it was not error to permit the presence of the piano, nor of a new piano action, in the court room for the purpose of illustrating expert evidence as to its condition, showing wear to pedals, keys, hammers, and internal mechanism, where there was testimony showing the character and extent of the use of the instrument between the date of purchase and time of trial.

EVIDENCE—PAROL EVIDENCE—FRAUD. In an action to recover the price of an instrument sold under a written contract, to which a counterclaim setting up fraud in the procurement of the contract had been interposed, parol evidence is admissible for the purpose of showing the fraudulent inducement, and it is not open to the objection that it is evidence of verbal representations tending to vary the terms of a written instrument.

APPEAL AND ERROR—QUESTIONS REVIEWABLE—INSTRUCTIONS. Error cannot be assigned upon instructions to a jury, where the action was of equitable cognizance and the court took the verdict as merely advisory and made complete findings on which it based its decree.

APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS. The findings of the trial court will not be set aside on trial *de novo* in the supreme court, when they are sustained by a decided preponderance of the evidence.

SALES—CONTRACTS — RESCISSION BY BUYER — ACTS CONSTITUTING. A finding that defendant rescinded a contract for the purchase of an electric piano is sustained by the evidence, although there was no formal rescission by a return of the instrument, when it appears that this was due to promises of plaintiffs to put the instrument in good condition, and also to subsequent negotiations looking to an exchange for another instrument; that, from the time of its first delivery, defendant insisted that the instrument did not comply with the representations which induced the contract, and refused to make additional payments on that ground, which in itself was sufficient to constitute notice of rescission.

[1]Reported in 147 Pac. 417.

Sales—Rescission—Waiver. Delay in formal rescission, induced by promises of the vendor of an instrument to make it work properly, is not a waiver of the right to rescind.

Judgment—Parties — Assignee for Collection—Personal Judgment. The entering of judgment, on rescission of a contract, against an assignee for collection is not error, where the only personal judgment entered against him was for the costs of the action.

Judgment—Persons Not Parties—Real Party in Interest. A judgment against one not named as a party to the action is not erroneous, where the court finds that the plaintiff was an assignee merely for collection; that the party against whom judgment was rendered was the real party in interest; that it was represented in the action by its agents who were paid by it; and that it actually participated in the trial, though not a nominal party; since one not a technical party is bound by the decree if he be interested in the subject-matter of litigation and has exercised the right to participate.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered November 29, 1913, after a trial before the court and a jury, in an action on contract. Affirmed.

Marx & Conger, for appellants.

Wende & Taylor, for respondent.

Ellis, J.—The plaintiff, Schroeder, as assignee for collection, brought this action to recover from the defendant unpaid installments on the purchase price of an electric piano, known as a "Welte Mignon," sold on conditional sale by Eilers Music House to the defendant. The facts are these:

In August, 1911, Schroeder was the manager of the North Yakima branch of the Eilers Music House, a corporation. About that time, Hitchings and Harrah, officers and chief owners of the defendant company, desiring to purchase some kind of automatic music instrument for use in their hotel, opened negotiations therefor with Schroeder. He had nothing in stock meeting their desire, and it was agreed that the three would look through the stock of Eilers Music House in Seattle, which they accordingly did on August 28, 1911.

One Hopper, manager of the Seattle house, showed them, among other automatic instruments, the one here in question. He represented that the Welte Mignon was an automatic piano the mechanism of which was made in Freiburg, Germany; that it differed from others in that it reproduced not only the notes, but the expression, style and mannerism of the artist who played the selection to produce the record; that it reproduced the playing of a given selection on the same principle that a phonograph reproduces the singer's voice. Neither Hitchings nor Harrah had any knowledge of musical instruments and, as the evidence shows, both were especially ignorant of instruments of this character. The operation of the instrument was demonstrated to them for something over an hour, during which time two or three selections were played. The mechanism was exposed and to some extent explained, but it is clear that none of the defects from wear, which afterwards developed, were pointed out to Hitchings or Harrah. Hitchings remarked that the case looked cloudy as if it had been used. Harrah remarked that the silk lining in the front of the case had rotted away. Hopper then informed them that the piano had been used for demonstration purposes at the Alaska-Yukon-Pacific Exposition, and since in the storeroom of the music house, but that it would be cleaned and polished and put in perfect order before being shipped. Hopper himself further testified:

"And I also assured them that the condition of the instrument was absolutely first class so far as the interior mechanism was concerned. It was not worn, it was not in bad condition, the keyboard was not yellow and the instrument itself was in good condition and for all intents and purposes to the purchaser should play just as well as new."

Hitchings and Harrah remarked that the instrument played too loudly and irregularly, but were informed that this was caused by an improper adjustment of the electric current by which the piano was operated. Finally, it was agreed that the defendant hotel company would purchase

the piano, receiving a small reduction on the regular price. Four hundred dollars was paid down upon the purchase price and it was agreed that the balance, amounting to $1,450, should be paid in installments. A conditional sale contract was drawn up and signed by the defendant company by Hitchings, its manager. This contract described the instrument as a "Welte Mignon," made no reference to it as an old, used or second-hand instrument, and provided that "any agreement other than expressed on the face of this note will not be recognized." It was admitted, however, that it was agreed at the time and as a part of the same transaction, that the instrument would be put in first class condition and all of the apparent defects remedied.

Early in September, 1911, the instrument was installed in the dining room of defendant's hotel at North Yakima, but the evidence shows that it failed to operate satisfactorily, that it produced loud and discordant notes, that it was used less than three months, being operated almost wholly by electrical current and seldom by hand; that the Eilers Music House sent an expert to remedy the defects, who remained in North Yakima for several days, but failed to materially or permanently remedy the defects; that the defendant company finally abandoned its use altogether. It also appears that the defendant's officers entered into negotiations with Schroeder for an exchange of the instrument for another, and that Schroeder, claiming that the matter would have to be referred to the head officers of the company, told them to pay no attention to the requests for payment of the installments falling due on the purchase price pending such negotiations. Finally, about the first of March, 1913, the defendant absolutely refused to make further payments, and the plaintiff brought this action to recover the balance of the purchase price. The defendant filed a cross-complaint seeking rescission of the contract on the ground that it was procured through false and fraudulent representations.

The cause was tried to the court and jury. A verdict was returned in favor of the defendant, but the court, after some days' consideration, concluded to treat the verdict of the jury as merely advisory, made complete findings of fact and conclusions of law, and entered a decree in favor of the defendant. Upon its own motion, the Eilers Music House was made a party plaintiff for the purpose of participating in this appeal.

I. The appellants claim that the court erred in permitting the presence of the piano in the courtroom during the trial and its use in illustrating the testimony of witnesses, on the ground that there was no evidence that its condition was at the time of the trial, November, 1913, the same as at the time of purchase. There was, however, evidence of the character and extent of the use of the instrument in the meantime. Hitchings testified that it was used for an hour each day at lunch and dinner for two or three weeks, that it was used very little after that, and within a month or two its use was discontinued altogether. That this was its only use, except a few times it was played by hand as an accompaniment to a violin. Expert evidence as to its condition, showing wear to pedals, keys, hammers and internal mechanism, which could not have resulted from such limited intermediate use, was also introduced. We are satisfied that both the court and the jury were better able to understand this testimony and to determine the probable condition of the instrument at the time of the sale with the machine itself before them than they would have been by the unillustrated testimony. Courts are permitted a wide discretion in the use of illustrative aids such as pictures, models and machines. *Harris v. Seattle, Renton & S. R. Co.*, 65 Wash. 27, 117 Pac. 601. This is a common practice, especially where questions of mechanism are involved. We find no error in the use of this machine, or in permitting its presence in the courtroom.

A kindred objection is advanced touching the use of a new piano action as illustrative of the testimony of an expert witness as to the difference between an old and a new action. What we have said of the use of the piano in issue sufficiently disposes of this objection.

11 It is contended that the court erred in admitting evidence of representations in the nature of warranties not contained in the written contract and in instructing the jury thereon, though it is asserted that the case was tried throughout upon the theory of fraud. We pass the manifest paradox in the claim that evidence and instructions were admitted and given on the theory of warranty while the case was tried throughout on the theory of fraud. Such claims, of course, are not to be met. The gravamen of appellants' complaint seems to be that the evidence of verbal representations in the [illegible] was admitted, that part of the contract [illegible] to which the terms of the [illegible] Hume v. [illegible] as a parallel case [illegible] presented [illegible] In that [illegible] to recover on [illegible] in that [illegible] the making of the [illegible] the [illegible] alleged [illegible] [illegible] the ground [illegible] [illegible] representations amounting to [illegible] [illegible] [illegible] that there [illegible] [illegible] [illegible]

no evidence that the defects complained of had resulted in monetary loss or measurable damage.

The case of *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022, was likewise defended on the ground of specific warranties, and a counterclaim for damages was interposed. No misrepresentation as to the amount of use to which the car there in question had been subjected was claimed. No rescission for fraud was sought.

In the case before us, the action was not to recover the possession of the instrument, but to recover the balance of the purchase price, the appellant thus waiving the right of possession for breach of the contract. The answer did not set up a counterclaim for damages for breach of warranties either express or implied, but sought by cross-complaint a rescission for failure of the instrument to comply with the conditions of the sale, namely, that the contract itself described the instrument as a Welte Mignon when it was not in fact, though so represented, and on the further ground of fraudulent misrepresentations inducing the sale, to the effect that the instrument, though not new, had only been used for demonstration, and that certain loud and discordant notes were not due to wear but to the use of an alternating electric current and would disappear when a direct current was applied.

When the court overruled the appellants' objection to the introduction of oral evidence in support of the cross-complaint he clearly noted the true distinction. He said, "The court construes the cross-complaint to be based upon rescission upon the ground of false representations of material facts inducing the making of the contract." This construction of the cross-complaint was clearly correct. The issue of inducing fraud, thus presented, opened the door to parol testimony as to the whole transaction, regardless of the fact that the resulting contract was in writing. This is elementary.

A kindred objection is advanced touching the use of a new piano action as illustrative of the testimony of an expert witness as to the difference between an old and a new action. What we have said of the use of the piano in issue sufficiently disposes of this objection.

II. It is contended that the court erred in admitting evidence of representations in the nature of warranties not contained in the written contract and in instructing the jury thereon, though it is asserted that the case was tried throughout upon the theory of fraud. We pass the manifest paradox in the claim that evidence and instructions were admitted and given on the theory of warranty while the case was tried throughout on the theory of fraud. Both claims, of course, could not be true. The ground of appellants' contention seems to be that the evidence of verbal representations in the nature of warranties made prior to the execution of the contract was inadmissible as tending to vary the terms of the writing itself. The case of *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023, is cited as a parallel case sustaining this contention. That case, however, presented wholly different issues from those presented here. In that case, the action was in the nature of replevin to recover an instrument sold on conditional sale contract similar to that here involved. The defendant admitted the making of the contract, but set up a counterclaim for damages on the ground that the instrument failed to meet certain alleged verbal warranties. No rescission of the contract on the ground of fraud was sought. No purely equitable defense was interposed. We held that verbal representations amounting to specific warranties were not admissible in evidence because not in the written contract. The trial court, however, did admit evidence of certain defects, on the ground that there was an implied warranty that the instrument was adapted to the purposes for which it was sold. We held, however, that the counterclaim was properly dismissed, not because this evidence was improperly admitted, but because there was

no evidence that the defects complained of had resulted in monetary loss or measurable damage.

The case of *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022, was likewise defended on the ground of specific warranties, and a counterclaim for damages was interposed. No misrepresentation as to the amount of use to which the car there in question had been subjected was claimed. No rescission for fraud was sought.

In the case before us, the action was not to recover the possession of the instrument, but to recover the balance of the purchase price, the appellant thus waiving the right of possession for breach of the contract. The answer did not set up a counterclaim for damages for breach of warranties either express or implied, but sought by cross-complaint a rescission for failure of the instrument to comply with the conditions of the sale, namely, that the contract itself described the instrument as a Welte Mignon when it was not in fact, though so represented, and on the further ground of fraudulent misrepresentations inducing the sale, to the effect that the instrument, though not new, had only been used for demonstration, and that certain loud and discordant notes were not due to wear but to the use of an alternating electric current and would disappear when a direct current was applied.

When the court overruled the appellants' objection to the introduction of oral evidence in support of the cross-complaint he clearly noted the true distinction. He said, "The court construes the cross-complaint to be based upon rescission upon the ground of false representations of material facts inducing the making of the contract." This construction of the cross-complaint was clearly correct. The issue of inducing fraud, thus presented, opened the door to parol testimony as to the whole transaction, regardless of the fact that the resulting contract was in writing. This is elementary.

A kindred objection is advanced touching the use of a new piano action as illustrative of the testimony of an expert witness as to the difference between an old and a new action. What we have said of the use of the piano in issue sufficiently disposes of this objection.

II. It is contended that the court erred in admitting evidence of representations in the nature of warranties not contained in the written contract and in instructing the jury thereon, though it is asserted that the case was tried throughout upon the theory of fraud. We pass the manifest paradox in the claim that evidence and instructions were admitted and given on the theory of warranty while the case was tried throughout on the theory of fraud. Both claims, of course, could not be true. The ground of appellants' contention seems to be that the evidence of verbal representations in the nature of warranties made prior to the execution of the contract was inadmissible as tending to vary the terms of the writing itself. The case of *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023, is cited as a parallel case sustaining this contention. That case, however, presented wholly different issues from those presented here. In that case, the action was in the nature of replevin to recover an instrument sold on conditional sale contract similar to that here involved. The defendant admitted the making of the contract, but set up a counterclaim for damages on the ground that the instrument failed to meet certain alleged verbal warranties. No rescission of the contract on the ground of fraud was sought. No purely equitable defense was interposed. We held that verbal representations amounting to specific warranties were not admissible in evidence because not in the written contract. The trial court, however, did admit evidence of certain defects, on the ground that there was an implied warranty that the instrument was adapted to the purposes for which it was sold. We held, however, that the counterclaim was properly dismissed, not because this evidence was improperly admitted, but because there was

no evidence that the defects complained of had resulted in monetary loss or measurable damage.

The case of *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022, was likewise defended on the ground of specific warranties, and a counterclaim for damages was interposed. No misrepresentation as to the amount of use to which the car there in question had been subjected was claimed. No rescission for fraud was sought.

In the case before us, the action was not to recover the possession of the instrument, but to recover the balance of the purchase price, the appellant thus waiving the right of possession for breach of the contract. The answer did not set up a counterclaim for damages for breach of warranties either express or implied, but sought by cross-complaint a rescission for failure of the instrument to comply with the conditions of the sale, namely, that the contract itself described the instrument as a Welte Mignon when it was not in fact, though so represented, and on the further ground of fraudulent misrepresentations inducing the sale, to the effect that the instrument, though not new, had only been used for demonstration, and that certain loud and discordant notes were not due to wear but to the use of an alternating electric current and would disappear when a direct current was applied.

When the court overruled the appellants' objection to the introduction of oral evidence in support of the cross-complaint he clearly noted the true distinction. He said, "The court construes the cross-complaint to be based upon rescission upon the ground of false representations of material facts inducing the making of the contract." This construction of the cross-complaint was clearly correct. The issue of inducing fraud, thus presented, opened the door to parol testimony as to the whole transaction, regardless of the fact that the resulting contract was in writing. This is elementary.

A kindred objection is advanced touching the use of a new piano action as illustrative of the testimony of an expert witness as to the difference between an old and a new action. What we have said of the use of the piano in issue sufficiently disposes of this objection.

II. It is contended that the court erred in admitting evidence of representations in the nature of warranties not contained in the written contract and in instructing the jury thereon, though it is asserted that the case was tried throughout upon the theory of fraud. We pass the manifest paradox in the claim that evidence and instructions were admitted and given on the theory of warranty while the case was tried throughout on the theory of fraud. Both claims, of course, could not be true. The ground of appellants' contention seems to be that the evidence of verbal representations in the nature of warranties made prior to the execution of the contract was inadmissible as tending to vary the terms of the writing itself. The case of *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023, is cited as a parallel case sustaining this contention. That case, however, presented wholly different issues from those presented here. In that case, the action was in the nature of replevin to recover an instrument sold on conditional sale contract similar to that here involved. The defendant admitted the making of the contract, but set up a counterclaim for damages on the ground that the instrument failed to meet certain alleged verbal warranties. No rescission of the contract on the ground of fraud was sought. No purely equitable defense was interposed. We held that verbal representations amounting to specific warranties were not admissible in evidence because not in the written contract. The trial court, however, did admit evidence of certain defects, on the ground that there was an implied warranty that the instrument was adapted to the purposes for which it was sold. We held, however, that the counterclaim was properly dismissed, not because this evidence was improperly admitted, but because there was

no evidence that the defects complained of had resulted in monetary loss or measurable damage.

The case of *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022, was likewise defended on the ground of specific warranties, and a counterclaim for damages was interposed. No misrepresentation as to the amount of use to which the car there in question had been subjected was claimed. No rescission for fraud was sought.

In the case before us, the action was not to recover the possession of the instrument, but to recover the balance of the purchase price, the appellant thus waiving the right of possession for breach of the contract. The answer did not set up a counterclaim for damages for breach of warranties either express or implied, but sought by cross-complaint a rescission for failure of the instrument to comply with the conditions of the sale, namely, that the contract itself described the instrument as a Welte Mignon when it was not in fact, though so represented, and on the further ground of fraudulent misrepresentations inducing the sale, to the effect that the instrument, though not new, had only been used for demonstration, and that certain loud and discordant notes were not due to wear but to the use of an alternating electric current and would disappear when a direct current was applied.

When the court overruled the appellants' objection to the introduction of oral evidence in support of the cross-complaint he clearly noted the true distinction. He said, "The court construes the cross-complaint to be based upon rescission upon the ground of false representations of material facts inducing the making of the contract." This construction of the cross-complaint was clearly correct. The issue of inducing fraud, thus presented, opened the door to parol testimony as to the whole transaction, regardless of the fact that the resulting contract was in writing. This is elementary.

A kindred objection is advanced touching the use of a new piano action as illustrative of the testimony of an expert witness as to the difference between an old and a new action. What we have said of the use of the piano in issue sufficiently disposes of this objection.

II. It is contended that the court erred in admitting evidence of representations in the nature of warranties not contained in the written contract and in instructing the jury thereon, though it is asserted that the case was tried throughout upon the theory of fraud. We pass the manifest paradox in the claim that evidence and instructions were admitted and given on the theory of warranty while the case was tried throughout on the theory of fraud. Both claims, of course, could not be true. The ground of appellants' contention seems to be that the evidence of verbal representations in the nature of warranties made prior to the execution of the contract was inadmissible as tending to vary the terms of the writing itself. The case of *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023, is cited as a parallel case sustaining this contention. That case, however, presented wholly different issues from those presented here. In that case, the action was in the nature of replevin to recover an instrument sold on conditional sale contract similar to that here involved. The defendant admitted the making of the contract, but set up a counterclaim for damages on the ground that the instrument failed to meet certain alleged verbal warranties. No rescission of the contract on the ground of fraud was sought. No purely equitable defense was interposed. We held that verbal representations amounting to specific warranties were not admissible in evidence because not in the written contract. The trial court, however, did admit evidence of certain defects, on the ground that there was an implied warranty that the instrument was adapted to the purposes for which it was sold. We held, however, that the counterclaim was properly dismissed, not because this evidence was improperly admitted, but because there was

no evidence that the defects complained of had resulted in monetary loss or measurable damage.

The case of *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022, was likewise defended on the ground of specific warranties, and a counterclaim for damages was interposed. No misrepresentation as to the amount of use to which the car there in question had been subjected was claimed. No rescission for fraud was sought.

In the case before us, the action was not to recover the possession of the instrument, but to recover the balance of the purchase price, the appellant thus waiving the right of possession for breach of the contract. The answer did not set up a counterclaim for damages for breach of warranties either express or implied, but sought by cross-complaint a rescission for failure of the instrument to comply with the conditions of the sale, namely, that the contract itself described the instrument as a Welte Mignon when it was not in fact, though so represented, and on the further ground of fraudulent misrepresentations inducing the sale, to the effect that the instrument, though not new, had only been used for demonstration, and that certain loud and discordant notes were not due to wear but to the use of an alternating electric current and would disappear when a direct current was applied.

When the court overruled the appellants' objection to the introduction of oral evidence in support of the cross-complaint he clearly noted the true distinction. He said, "The court construes the cross-complaint to be based upon rescission upon the ground of false representations of material facts inducing the making of the contract." This construction of the cross-complaint was clearly correct. The issue of inducing fraud, thus presented, opened the door to parol testimony as to the whole transaction, regardless of the fact that the resulting contract was in writing. This is elementary.

We shall not review the instructions further than to say that they contain no material error. In any event they are of no controlling importance here. The trial court took the verdict as merely advisory, treating the case as one in equity, made complete findings and based its decree thereon. No error is assigned upon this treatment of the case. It is here for trial *de novo* as other actions tried to the court. The instructions, whether right or wrong, cannot have any material bearing upon the result.

III. It is next contended that the court's findings generally were not sustained by the evidence. The court found, in substance, that the officers of the cross-complainant were wholly ignorant of the construction and operation of electric pianos; that during the negotiations looking to the sale, they noticed from the case and the lining of the face that it did not appear to be a new piano, and noticed that it did not play properly; that upon these things being indicated, the agent of Eilers Music House in Seattle, in the presence of Schroeder, represented that while not a new piano, it had only been used for the purpose of demonstration to prospective purchasers and to the public in the salesroom of the music house and at the Alaska-Yukon-Pacific Exposition, and that "the piano was practically to all intents and purposes a new piano;" that these representations were made for the purpose of inducing the purchase, were relied upon by the cross-complainant as being true, and induced the making of the written contract of purchase; that when delivered the instrument failed to play properly and an expert, sent by the Eilers Music House to adjust it, failed to make it play properly, but on the contrary it continued to play so loudly and discordantly that it was useless for operation in the dining room; that it was used for about three months during the noon and evening meals and occasionally at night, almost entirely by mechanical operation; that its usage by the cross-complainant was not such as to cause any of the defects found by the court to exist; that the pedals were worn, show-

ing that the instrument had been much operated by hand; that the keyboard was out of alignment and the keys somewhat discolored; that the original name on the fall board had been almost completely obliterated by scratching the finish at that point, and the original name covered by a plate upon which appeared the name "Welte & Sons;" that the bellows contained holes and was worn in the creases; that one of the two air tubes had been removed and replaced by a tube of different material and design from the original; that at the time of the purchase, none of these defects were observed by the officers of the cross-complainant, because of their lack of experience touching such instruments; that the instrument had received, prior to the sale, much harder usage and was in a much more worn condition than it would have been had it only been used for the purpose and to the extent represented, and that it was, at the time of the trial, in practically the same condition as when it was first delivered to the cross-complainant.

We have read the abstract and supplemental abstract of record with frequent recourse to the statement of facts. Any detailed discussion of the evidence would extend this opinion to prohibited length. It must suffice to say that we are convinced that the court's findings are sustained by the decided preponderance of evidence.

IV. It is also contended that the court's finding to the effect that the respondent rescinded the contract is not sustained by the evidence. While there was no formal rescission by an actual return of the instrument prior to the commencement of the action in March, 1913, the evidence makes it clear that the promises of the appellants to put the instrument in good condition and the subsequent negotiations looking to an exchange for another instrument was the sole reason for the respondent's retention of this piano. In fact the evidence makes it clear that there was never more than a conditional acceptance of this instrument. From the time of its first delivery the respondent insisted that the instrument did not

comply with the representations which induced the contract, and refused to make any additional payments on that ground. This in itself was, under the circumstances, a sufficient notice of a rescission. It is too clear for doubt that any offer to return the piano would have been refused.

Diligence in rescission is always a relative question. What is laches in a given case is always dependent upon the particular circumstances. *Thompson v. Rhodehamel*, 71 Wash. 24, 127 Pac. 572; *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051. Delay in formal rescission, induced by promises of the vendor to make machinery work properly, is not a waiver of the right to rescind. *Crabtree v. Potts*, 108 Ill. App. 627; *McCormick Harvesting Mach. Co. v. Dodkins*, 24 Ky. Law 2306, 73 S. W. 1129; *Laumeier v. Dolph*, 145 Mo. App. 78, 130 S. W. 360; *Wood Mowing & Reaping Mach. Co. v. Calvert*, 89 Wis. 640, 62 N. W. 532; *Fuller v. Chenault*, 157 Ala. 46, 47 South. 197.

V. It is next urged that the court erred in entering judgment for the $400 paid upon the contract against the plaintiff Schroeder who was only an assignee for collection. It is asserted that the "plaintiff was not liable in any event for more than the costs of the action." The answer to this contention is that no personal judgment was entered against the plaintiff except for costs.

VI. Finally it is contended that the court erred in entering any judgment against the Eilers Music House because that corporation was not a party to the action. The court found that the plaintiff was an assignee merely for collection; that the Eilers Music House was the real party in interest; that it was represented in the action by its agents who were paid by it; and that it actually participated in the trial though not a nominal party to the action. This finding was excepted to, but its correctness is not questioned in appellants' brief or argument. It is amply supported by the record. Upon its own motion the Eilers Music House was made a party to this appeal. The trial here is *de novo*.

Every party in interest is now before this court. There is no pretense that the Eilers Music House, had it been a nominal party throughout, could have advanced anything further in its behalf than has been presented. To compel the respondent to again litigate this transaction with that company would be a manifest injustice. We have often held that a person, though not a technical party to the action, is bound by a decree if he be interested in the subject-matter and has exercised the right to participate in the litigation. *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186; *Shoemake v. Finlayson*, 22 Wash. 12, 60 Pac. 50; *American Bonding Co. v. Loeb*, 47 Wash. 447, 92 Pac. 282; *Kibler v. Maryland Casualty Co.*, 74 Wash. 159, 132 Pac. 878.

The court decreed that the contract be cancelled, that the respondent have an equitable lien upon the piano for the $400 paid thereon, with interest from August 28, 1911, until the same be paid by the plaintiff or Eilers Music House, that upon such payment the piano be delivered to the plaintiff or the Eilers Music House, and that upon failure of such payment within thirty days from the date of judgment the respondent might foreclose its lien upon the piano.

Upon a careful consideration of the whole record, we are satisfied that the decree should be affirmed. It is so ordered.

FULLERTON, MOUNT, MAIN, and CROW, JJ., concur.

[No. 11418. *En Banc.* February 6, 1915.]

RICHARD H. LORD, *Respondent*, v. WAPATO IRRIGATION COMPANY *et al.*, *Appellants*.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered April 26, 1913, upon findings in favor of the plaintiff, in an action for an accounting, tried to the court. Reversed.

Donworth & Todd and *Reeves, Crollard & Reeves* (*Francis H. Brownell*, of counsel), for appellants.

Dorr & Hadley and *T. E. Cade*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein as reported in 81 Wash. 561, 142 Pac. 1172.

For the reasons there stated, the judgment is reversed.

[No. 11457. *En Banc.* February 6, 1915.]

PHILIP A. KRUG, *Respondent*, v. DORA E. KRUG, *Appellant*.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 18, 1913, upon findings in favor of the plaintiff, in an action for a divorce, after a trial to the court. Reversed.

Robertson & Miller, for appellant.

Scott & Campbell, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein as reported in 81 Wash. 461, 142 Pac. 1136.

For the reasons there stated, the judgment is reversed.

[No. 11832. *En Banc.* February 6, 1915.]

CHARLES FLESSHER, *Respondent*, v. CARSTENS PACKING COMPANY, *Appellant*.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered October 18, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

James W. Carr and *Kerr & McCord*, for appellant.
Garland & McLane, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein as reported in 81 Wash. 241, 142 Pac. 694.

For the reasons there stated, the judgment is reversed.

[No. 12547. Department One. February 9, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Seattle School District No. 1, Plaintiff*, v. JOSEPHINE C. PRESTON, *as Superintendent of Public Instruction, Respondent.*[1]

Application filed in the supreme court December 14, 1914, for a writ of mandamus to compel the state superintendent of public instruction to apportion certain current school funds. Denied.

Henry W. Pennock, for relator.

The Attorney General and *Edward W. Allen, Assistant*, for respondent.

PER CURIAM.—Application for a writ of mandamus, directing the respondent as state superintendent of public instruction, to apportion and allow to the relator the sum of $2,199.70 as of October 20, 1914, and to apportion to the relator from the state school funds which shall be reported by the auditor in January, April, May, and June, 1915, its proportionate amount, based upon the total school attendance as shown in the annual report of the county superintendent. The county superintendent for the year ending June 30, 1914, reported the total school attendance in Seattle school district No. 1 to be 6,704,976 days. The state superintendent of public instruction de-

[1]Reported in 146 Pac. 492; 149 Pac. 352.

ducted therefrom ten days in which school was held during the period between June 1 and September 15 of the preceding year. The decision in the case of *State ex rel. School District No. 301 of Whatcom County v. Preston*, *ante* p. 79, 146 Pac. 175, is controlling in this case.

The writ is therefore denied.

MORRIS, C. J. (dissenting)—For the reasons given in *State ex rel. School District No. 301 of Whatcom County v. Preston*, *ante* p. 79, 146 Pac. 175, I dissent.

CHADWICK, J., concurs with MORRIS, C. J.

ON REHEARING.

[*En Banc.* June 8, 1915.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein. For the reasons there stated, the writ is denied.

[No. 12392. Department One. February 11, 1915.]

LEWIS S. BARNARD *et al.*, *Respondents*, v. D. F. CLARKE, *Appellant*.[1]

Cross-appeals from a judgment of the superior court for Thurston county, Claypool, J., entered April 16, 1914, in favor of the plaintiffs, in an action for equitable relief, tried to the court. Affirmed.

Alfred P. Dobson and *Bigelow & Manier*, for appellant.
W. H. Abel, *R. H. Fry*, and *Fred A. Sarjent*, for respondents.

PER CURIAM.—This action was brought to set aside certain conveyances made by the plaintiff to the defendant, to rescind the record acceptance of a deed to certain property conveyed by defendant to plaintiff, and for other equitable relief. The court below entered a decree in favor of the plaintiff, conditioned upon the payment of the sum of $1,250 into the registry of the court by the plaintiff for the use and benefit of defendant. Clarke has appealed from all of the decree, and Barnard has appealed from that part of the decree awarding Clarke a judgment in the sum of $1,250. The transaction leading up to the suit between the parties is so intricate and involved that it would serve no useful purpose to detail the facts. An epitomization of the briefs filed by counsel would go far beyond the limits of any of our written opinions. Various grounds are urged for the setting aside of the conveyances and restoring the

[1]Reported in 146 Pac. 175.

parties to their original status. Clarke insists that none of them are sufficient. It may be that any one of the circumstances relied on would be insufficient, but taking the case by its four corners, we are not prepared to say that the findings of the trial judge are not sustained by a preponderance of the evidence. Although both sides cite authorities, there is no question of law involved, and no authorities are cited other than cases tending to sustain the conclusion of fact drawn by counsel. It may be admitted that, if the facts are as respective counsel contend, the proffered rule would follow.

We think the decree of the trial judge is as nearly right as it is possible for any court to render, considering the mystifying tangle of fact into which the parties to this action involved themselves.

The judgment of the lower court is affirmed.

[No. 12001. Department One. March 13, 1915.]

FRED MASER, *Appellant*, v. SIDNEY L. BRUNN, *Respondent*.[1]

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered January 3, 1914, upon findings in favor of the defendant, in an action by a third person to establish title to property held under attachment, tried to the court. Affirmed.

M. H. Ingersoll, for appellant.

J. H. Templeton, for respondent.

MOUNT, J.—In the year 1912, the respondent in this action, Sidney L. Brunn, and one J. F. Finnigan, were the owners of an automobile. Mr. Finnigan bought the interest of Mr. Brunn therein. In payment he delivered his promissory note for $150. When this note became due on September 15, 1912, demand was made for payment, and Finnigan refused to pay. Thereafter, on October 15, Mr. Brunn brought suit upon the note. The sheriff took possession of the automobile under a writ of attachment. Thereafter the appellant, Fred Maser, filed an affidavit with the sheriff under Rem. & Bal. Code, § 573 (P. C. 81 § 891), claiming to own the automobile. He also delivered a bond to the sheriff as provided for in that section. The sheriff thereupon surrendered the possession of the automobile to Mr. Maser. Thereafter Maser's claim of title to the automobile was tried to the court without a jury. During the progress of the trial, it appeared that Mr. Maser had transferred the automobile to one Ingersoll. At the conclusion of the evidence, the court found that Maser was not entitled to the relief sought, and entered a judgment against him and

[1]Reported in 146 Pac. 1044.

the sureties upon the bond for the amount due upon the note in the original action, viz., $202.90.

The principal issue upon the trial of the case was whether the transfer from Finnigan to Maser was a good faith transfer. This was a question entirely of fact, and the court, after hearing the evidence, concluded as above stated. We have examined the evidence, which is short, and conclude that there are facts and circumstances in the case from which the court might rightfully conclude that the transfer from Finnigan to Maser was not a good faith transaction.

The judgment is therefore affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12562. *En Banc.* March 22, 1915.]

GREAT NORTHERN RAILWAY COMPANY, *Appellant*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for Thurston county, Claypool, J., entered October 1, 1914, dismissing an action to recover taxes paid under protest, upon sustaining a demurrer to the complaint. Affirmed.

F. V. Brown and *F. G. Dorety*, for appellant.

The Attorney General and *Edward W. Allen*, *Assistant*, for respondents.

PER CURIAM.—This case was heard in the superior court and also upon appeal in this court with that of *Northern Pac. R. Co. v. State*, *ante* p. 510, 147 Pac. 45. The same questions are presented in both cases. We affirm the judgment of the superior court in this case upon the same grounds assigned in our decision in that case.

[1]Reported in 147 Pac. 57.

INDEX.

ABANDONMENT:

Of appeal, taking new appeal, see APPEAL AND ERROR, 7.

ABATEMENT AND REVIVAL:

Judgment as bar to another action, see JUDGMENT, 9-15.

ABSTRACTS:

Of record on appeal or writ of error, see APPEAL AND ERROR, 11.

ABUTTING OWNERS:

Compensation for taking of or injury to lands or easements for public use, see EMINENT DOMAIN, 5-8.

Assessments for public improvements, see MUNICIPAL CORPORATIONS, 14-19.

Preference right to purchase tide and shore lands, see PUBLIC LANDS.

ACCEPTANCE:

Of work under contract for state building, see STATES, 1-3.

ACCIDENT:

To employee, see MASTER AND SERVANT, 3-7.

To person in city street, see MUNICIPAL CORPORATIONS, 20-22.

ACCOUNT:

See ACCOUNT STATED.

Accounting between partners, see PARTNERSHIP, 2, 3.

ACCOUNT STATED:

1. ACCOUNT STATED — RENDITION OF ACCOUNT — ASSENT — PRESUMPTIONS—BURDEN OF PROOF. The mere rendition of an account by one party to another, although time may elapse without objection interposed, will not make it an account stated, when there is no other element of agreement thereto than merely the lapse of time, and no circumstances creating an estoppel; since reception of the account without objection operated only to shift the burden of proof to the debtor, and any presumption of assent on his part is rebuttable. *Merritt v. Meisenheimer* 174

2. SAME—ESTOPPEL TO DISPUTE. Failure to dispute an account rendered during a period of nearly one year after the reception of the first statement would not work an estoppel, where the parties gave

ACCOUNT STATED—CONTINUED.

up nothing nor changed their legal position in any way by rendering their account. *Merritt v. Meisenheimer*..... 174

3. SAME — FAILURE TO OBJECT — REASONABLE TIME — QUESTION FOR JURY. The trial court is not warranted in discharging the jury and holding that an account rendered is an account stated as a matter of law, because the debtor did not object within what the court deemed a reasonable time; but the presumption arising against the debtor from lapse of time must be measured with reference to the business capacity of the parties, their relative situation, dealings, intelligence, and all other circumstances; thus presenting a question for the jury as to whether such time elapsed, without excuse for delay, as to raise a presumption of assent constituting a binding promise to pay the account as stated. *Merritt v. Meisenheimer*..... 174

4. SAME—OPPORTUNITY TO CHALLENGE ACCOUNT—EFFECT. The fact that the debtor and his creditors frequently met at lunch and in lodge meetings without the subject of the account rendered being broached by the debtor would not be sufficient to establish his assent thereto, but would be no more than one circumstance to be considered in arriving at a conclusion. *Merritt v. Meisenheimer*.... 174

5. ACCOUNT STATED—PLEADING—COMPLAINT. A plaintiff who elects to base his action upon an account stated must allege that the account was in fact agreed to, and it is not sufficient to allege merely collateral facts from which the ultimate fact may or may not follow. *Merritt v. Meisenheimer*..... 174

ACTION:

See ACCOUNT STATED; APPEAL AND ERROR; BILLS AND NOTES; CERTIORARI; CONTRACTS; DIVORCE; EXECUTION; FALSE IMPRISONMENT; FRAUD; INDEMNITY; INJUNCTION; JUDGMENT; LANDLORD AND TENANT; LIBEL AND SLANDER; NEGLIGENCE; NEW TRIAL; PLEADING; REPLEVIN; SPECIFIC PERFORMANCE; WORK AND LABOR.

Assignees, see ASSIGNMENTS, 1.

For negligence of bailee, see BAILMENT.

By or against broker, see BROKERS.

For damages in carriage of live stock, see CARRIERS.

Foreign corporation, see CORPORATIONS, 2, 3.

Criminal prosecutions, see CRIMINAL LAW.

Heirs, see DESCENT AND DISTRIBUTION.

On supersedeas bond, see DIVORCE, 14.

Taking of or injury to property in exercise of power of eminent domain, see EMINENT DOMAIN.

By guardian *ad litem*, see GUARDIAN AND WARD.

On insurance policy, see INSURANCE, 3, 4.

Recovery of insurance premiums, see INSURANCE, 5, 6.

Vacation of judgment, see JUDGMENT, 1, 7, 8.

Bar by former adjudication, see JUDGMENT, 9-15.

ACTION—CONTINUED.

Malicious actions, see MALICIOUS PROSECUTION.
Personal injuries to servant, see MASTER AND SERVANT, 3-7.
Personal injuries in city street, see MUNICIPAL CORPORATIONS, 20-22.
By or against partners, see PARTNERSHIP.
For services of physician, see PHYSICIANS AND SURGEONS, 1.
Malpractice, see PHYSICIANS AND SURGEONS, 2, 3.
Sale to agent, see PRINCIPAL AND AGENT, 1.
Notice of action, see PROCESS.
By or against receivers, see RECEIVERS, 2.
On contract of sale, see SALES.
On contractor's bond, see STATES, 1.
Recovery of subscription, see SUBSCRIPTIONS.
To recover taxes paid, see TAXATION, 1, 2, 5-8.
To cancel tax, see TAXATION, 3, 4.
Trial of, see TRIAL.
Obstructing stream, see WATERS AND WATER COURSES, 1-3.
Pollution of water course, see WATERS AND WATER COURSES, 7.

ADEQUATE REMEDY AT LAW:

Effect on jurisdiction of equity, see INJUNCTION, 1.
Adequacy of other remedy as affecting right to prohibition, see PROHIBITION, 1.

ADJUDICATION:

Operation and effect of former adjudication, see JUDGMENT, 9-15.

ADJUSTERS:

Acts of as constituting waiver of defenses by company, see INSURANCE, 3, 4.

ADVERSE POSSESSION:

1. ADVERSE POSSESSION—CLAIM OF RIGHT — MISTAKEN BELIEF — EVIDENCE—SUFFICIENCY. Under the rule that adverse possession must be under a claim of right for the full statutory period of ten years where there is no color of title even if possession was under a mistake, and that entry and possession under the mistaken belief that it was public land is not hostile or adverse to the owner, the purchaser of a lot in a dedicated plat does not, by adverse possession, acquire title to a strip of adjoining tide lands, about fifty feet wide, extending to the government meander line, which strip was not included in the dedicated plat, a portion of which he occupied with a boat shop and float for eighteen years, where his testimony was to the effect that, at the time of his purchase, he supposed that he was buying "to the water" or to the line of high tide, that his boat shop was above that, and he supposed his ownership to high tide gave him the right to the tide lands (which belong to the government), that he had no knowledge of the meander line, no representations were made, and he made no express claims of title; and when he

ADVERSE POSSESSION—CONTINUED.

sold, he described the lot only, and moved off his boat shop and float. *Skansi v. Novak*..... 39

2. ADVERSE POSSESSION—ALIENS—COLOR OF TITLE—SHERIFF'S CERTIFICATE OF SALE—PAYMENT OF TAXES. A sheriff's certificate of sale to an alien, coupled with an assignment thereof and a quitclaim deed from the alien to a citizen, on which a sheriff's deed was issued to the assignee, constitutes a complete chain of title; or at least color of title upon which a complete title is vested by adverse possession and payment of taxes for more than seven years. *Prentice v. How*..... 136

AFFIDAVITS:

Value of property, see REPLEVIN.

AGENCY:

See PRINCIPAL AND AGENT.

AGREEMENT:

See CONTRACTS.

AGRICULTURE:

Validity of horticultural inspection law, see CONSTITUTIONAL LAW, 6.

1. AGRICULTURE—INSPECTION—"HORTICULTURAL PRODUCTS"—INFECTED POTATOES. Potatoes are horticultural products within the contemplation of Rem. & Bal. Code, §§ 3095, 3096, authorizing the district horticultural inspectors of the state to inspect, require disinfection of, or destroy horticultural products packed for shipment, offered for sale, or held for the purpose of delivery upon any shipment or sale, where the same or any part thereof is infected with any disease or pest declared injurious by the state commissioner of horticulture. *Los Angeles Berry Growers' Co-Operative Ass'n v. Huntley*..... 155

ALIENS:

1. ALIENS—TITLE TO REAL ESTATE—RIGHT TO QUESTION. The right of an alien to hold real estate contrary to the prohibition of art. 2, § 33, of the state constitution can be questioned by the state alone, and where the state fails to move in the matter until after conveyance by the alien to a citizen, the right to raise the question of title is foreclosed. *Prentice v. How*..... 136

ALIMONY:

Pending appeal, see DIVORCE, 6-8, 13, 14.

ALTERATIONS:

Liability of tenant, see LANDLORD AND TENANT, 4.

AMBIGUITY:

In contract, construction of, see CONTRACTS, 1.

AMENDMENT:

On appeal or writ of error, see APPEAL AND ERROR, 13-15.
Of claim against city as harmless error, see APPEAL AND ERROR, 28.
Of judgment on appeal, see APPEAL AND ERROR, 33.
Of municipal ordinance, repeal, see MUNICIPAL CORPORATIONS, 1.
Of claim against city for damages, see MUNICIPAL CORPORATIONS, 28, 29.
Of pleading, see PLEADING, 2, 4.

ANIMALS:

Carriage of live stock, see CARRIERS.

ANSWER:

To interrogatories, see DEPOSITIONS.
In pleading, see PLEADING, 1, 2.

APPEAL AND ERROR:

See CERTIORARI.
Right of judgment debtor to bail pending appeal from order denying motion to vacate order of arrest, see BAIL.
Review of legislative declaration as to emergency acts, see CONSTITUTIONAL LAW, 1.
Review in criminal prosecutions, see CRIMINAL LAW, 9, 10.
Appeal in divorce proceedings, see DIVORCE, 5, 13, 14.
Condemnation proceedings, see EMINENT DOMAIN, 9.
Habeas corpus to admit to bail pending appeal, see HABEAS CORPUS.
Harmless error in entry of judgment as to one cause of action, see JUDGMENT, 5.
Review of judgment, see JUDGMENT, 6.
Assessment for public improvements, see MUNICIPAL CORPORATIONS, 18, 19.
Adequacy of remedy by as affecting right to prohibition, see PROHIBITION, 1.
Prohibition to court pending appeal, see PROHIBITION, 2.
From orders of board of land commissioners denying claimed preference rights to purchase shore lands, see PUBLIC LANDS, 2, 3.
Assessment of taxes, see TAXATION, 8, 9.

III. DECISIONS REVIEWABLE.

1. APPEAL—APPEALABLE ORDERS — VACATING JUDGMENT — FINALITY — PARTIES ENTITLED. The purchaser at a partition sale, who was not a party to the action, may appeal from an order vacating the judgment and setting aside the sale; as the order was, as to him, a final judgment, determining his rights in the matter. *Prince v. Mottman* 287

APPEAL AND ERROR—CONTINUED.

IV. RIGHT TO APPEAL.

2. APPEAL—RIGHT TO APPEAL—INTEREST—ABSTRACT QUESTIONS. In an action to foreclose a mortgage, in which the defendant city's lien for an assessment was held superior, the city has no right to appeal from a decree holding that another assessment lien, held by a third person, in which the city was not interested, was inferior to the mortgage lien, on the theory that it was interested in the abstract question of law involved therein. *Carstens & Earles v. Seattle* 88

3. APPEAL AND ERROR—RIGHT TO REVIEW—WAIVER OF ERROR—CONSENT. An allowance of an attorney's fee of $75 upon decreeing foreclosure of a lien for $86 will not be disturbed on appeal, where the parties had stipulated that, in the event the court should find in favor of the plaintiffs, or either of them, the attorney's fee allowed should be $75. *Bradley v. Donovan-Pattison Realty Co*..... 654

V. PRESERVATION AND RESERVATION IN LOWER COURT.

4. APPEAL—PRESERVATION OF GROUNDS—CAPACITY TO SUE—WAIVER OF OBJECTION. The objection that a corporation, appearing as an adverse claimant to property levied upon, had not paid its annual license fee, is waived if not raised below by demurrer, answer or reply; and it is not raised by motion for a new trial in the absence of a showing that the objection was advanced at that time. *Ransom v. Wickstrom & Co*..... 419

5. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS—NECESSITY. Where a judgment denying the foreclosure of a mortgage was based upon affirmative findings of fact that the mortgage was a forgery, and not upon the insufficiency of plaintiff's evidence, exceptions to the findings are necessary to a review of the evidence on appeal. *Union Central Life Insurance Co. v. Hawkins*..... 605

6. SAME—REVIEW—FINDINGS — EXCEPTIONS — NECESSITY. In the absence of findings as to whether plaintiff in a mortgage foreclosure had an equitable lien for taxes paid, and of any exceptions to the findings on which the action was dismissed, the subject cannot be inquired into on appeal. *Union Central Life Insurance Co. v. Hawkins* 605

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

7. APPEAL—PROCEEDINGS—ABANDONMENT — SECOND APPEAL. The failure to perfect an appeal, or the abandonment thereof by a party having the right to appeal, does not prevent the party from taking and perfecting a new appeal within the time allowed by law. *Carstens & Earles v. Seattle*..... 88

APPEAL AND ERROR—CONTINUED.

8. APPEAL—PROCEEDINGS—TIME FOR APPEAL — BY COPARTIES — INEFFECTUAL APPEAL. A party having no right to appeal, cannot, by an attempted appeal, curtail or limit the ninety days allowed by law for an appeal to a coparty, interested in the real controversy and having a right to appeal; Rem. & Bal. Code, § 1720, requiring coparties to join in an appeal taken, or give notice of independent appeal within twenty days after an appeal taken, not applying in such a case. *Carstens & Earles v. Seattle*..... 88

9. APPEAL—BOND—NOTICE—TIME FOR FILING. An appeal must be dismissed where the appeal bond was not filed within five days after service of the notice of appeal, under Rem. & Bal. Code, § 1721, providing that an appeal shall become ineffectual for any purpose unless the appeal bond is so filed. *Heine v. Hall*..... 260

10. APPEAL AND ERROR—NOTICE OF APPEAL—SUFFICIENCY. Where there were two judgments in one action, and appeal was taken from but one, without mentioning the other in the notice, the latter cannot be considered on appeal, in view of Rem. & Bal. Code, § 1719, which provides that the notice shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken. *Winton Motor Carriage Co. v. Blomberg*..... 451

X. RECORD

11. APPEAL—RECORD — ABSTRACT — SUFFICIENCY. An abstract of the record required on appeal is insufficient when it does not purport to abstract any of the evidence incorporated in the statement of facts, nor make citations to the transcript. *Heine v. Hall*..... 260

XVI. REVIEW.

12. APPEAL AND ERROR—QUESTIONS REVIEWABLE—INSTRUCTIONS. Error cannot be assigned upon instructions to a jury, where the action was of equitable cognizance and the court took the verdict as merely advisory and made complete findings on which it based its decree. *Schroeder v. Hotel Commercial Co*..... 685

13. APPEAL—REVIEW—AMENDMENTS. After the introduction of evidence without objection, the complaint will be deemed amended on appeal to conform to the truth. *Mason County v. McReavy*.... 9

14. APPEAL—REVIEW—OBJECTIONS NOT URGED BELOW — AMENDMENTS. In an action to foreclose a laborer's lien, an objection that the record does not show that any copy of the lien notice was served as required by law, comes too late when first made on the hearing of the appeal, Rem. & Bal. Code, § 1752, requiring the supreme court to disregard any defect in the pleadings that might have been cured by amendment, and fairness to counsel and the court requiring that the point be urged in the court below and in appellant's brief on appeal. *Cook v. Washington-Oregon Corporation*..... 68

APPEAL AND ERROR—CONTINUED.

15. APPEAL AND ERROR—REVIEW—AMENDMENT OF PLEADINGS. The rule that the sufficiency of a complaint, curable by amendment, will not be inquired into on appeal is inapplicable where the trial court granted judgment on the pleadings on the ground that the answer presented no issue, when the basic error was that the complaint itself set forth no issuable fact. *Merritt v. Meisenheimer*..... 174

16. APPEAL—REVIEW—ABSENCE OF FINDINGS—PRESUMPTIONS. No findings of fact being necessary in an equity case, incomplete findings are not ground for reversal, and the correctness of the judgment will be presumed, in the absence of a statement of facts or any affirmative showing in the record of prejudicial error. *Cook v. Washington-Oregon Corporation* 68

17. APPEAL AND ERROR—REVIEW—PRESUMPTIONS—PREJUDICE. Upon a disputed question as to alleged slanderous statements, prejudice will be presumed where the jury were instructed that statements were actionable *per se* and malice would be presumed, necessarily resulting in damage, when the statements were not libelous *per se*. *Paysse v. Paysse*..... 351

18. APPEAL—REVIEW—GRANT OF NEW TRIAL — DISCRETION. The discretion of the trial court in granting a new trial upon conflicting evidence as to whether the jurors were guilty of misconduct in agreeing to be bound by the result of a quotient verdict, will not be disturbed on appeal, where it cannot be said that the evidence preponderates against the finding of the trial judge. *Gamer v. Schlentz* 37

19. APPEAL—REVIEW—DISCRETION—NEW TRIAL. A ruling on motion for a new trial for newly discovered evidence will not be disturbed except for abuse of discretion. *Hoxsey v. Murray*..... 588

20. APPEAL—REVIEW—VERDICTS. A verdict upon conflicting evidence, sufficient to support the theory of either side, is conclusive on appeal. *Independent Order of Foresters v. Bonner*..... 13

21. APPEAL—REVIEW—VERDICT. A verdict on sharply conflicting evidence, upon which it can only be said the jury might well have found the other way, is conclusive on appeal. *Yamamoto v. Puget Sound Lumber Co*..... 411

22. APPEAL AND ERROR — VERDICT — CONCLUSIVENESS. Where the evidence, though conflicting, sustains the verdict, it will not be disturbed on appeal. *Bunck v. McAulay*..... 473

23. APPEAL—REVIEW—VERDICT. The verdict of a jury upon directly conflicting evidence upon the only question at issue is conclusive on appeal. *Hoxsey v. Murray*..... 588

24. APPEAL—REVIEW—FINDINGS. Upon a close question of fact, findings are entitled to weight and will not be set aside on appeal unless

APPEAL AND ERROR—CONTINUED.

not sustained by the preponderance of the evidence. *Laughlin v. Seattle Taxicab & Transfer Co*..... 342

25. APPEAL AND ERROR—REVIEW—FINDINGS OF TRIAL COURT—CONCLUSIVENESS. The findings of a trial judge, who personally saw and heard the witnesses, will not be disturbed on appeal where the appellate court is not able to say that such findings are clearly not supported by the weight of the evidence, even if contrary to the majority of the witnesses. *Bradley v. Donovan-Pattison Realty Co.* 654

26. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS. The findings of the trial court will not be set aside on trial *de novo* in the supreme court, when they are sustained by a decided preponderance of the evidence. *Schroeder v. Hotel Commercial Co*..... 685

27. APPEAL—REVIEW—HARMLESS ERROR — REMISSION. The erroneous inclusion of a $65 item of damages does not warrant a reversal; since it may be deducted from the amount of the judgment. *Wagner v. Seattle* 275

28. APPEAL—REVIEW—HARMLESS ERROR. It is harmless error to allow the amendment of a claim against a city where no evidence was offered to prove the item of damages added by the amendment. *Wagner v. Seattle*..... 275

29. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Reversible error cannot be claimed in the admission of relevant testimony as to one of the defendant's acts in polluting a stream, of which there was insufficient evidence to support that item of the complaint, which was practically abandoned; there being no motion made to exclude the evidence, and no requests for instructions thereon. *Packwood v. Mendota Coal & Coke Co*..... 47

30. APPEAL—REVIEW—HARMLESS ERROR. Evidence having no bearing on the issues of the case is harmless. *Yamamoto v. Puget Sound Lumber Co.* 411

31. APPEAL—REVIEW—HARMLESS ERROR—CURED BY VERDICT. In an action for damages to crops and live stock by the obstruction of a stream and overflowing plaintiff's lands, in which the court instructed the jury that the plaintiff could not recover for loss of live stock if acts of the plaintiff concurred to produce the loss, or if the jury was unable to say which cause produced it, and there was ample evidence to sustain the verdict by reference to damage to crops alone, it is a fair inference that the verdict was based on the loss of crops, and error cannot be predicated on the evidence or instructions relating to the live stock. *Miller v. Eastern R. & Lumber Co.* 31

32. APPEAL—REVIEW—HARMLESS ERROR — ERROR NOT AFFECTING RESULT. Error in instructions to the jury is harmless, where the case should have been taken from the consideration of the jury, or no

APPEAL AND ERROR—CONTINUED.

other verdict could be sustained. *Briscoe v. Washington-Oregon Corporation* 29

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

33. APPEAL AND ERROR—DETERMINATION—LIABILITY OF TRUSTEE—JUDGMENT—REFORMATION. A decree foreclosing mechanics' liens against a bankrupt corporation's estate is not invalid as a personal judgment against the trustee in bankruptcy, merely from the fact that it reads against an individual "as trustee for said corporation," when from a reading of the whole decree it is evident no personal judgment was intended; but, in the interest of certainty, it should be amended to read "against the estate and assets" of the bankrupt. *Bradley v. Donovan-Pattison Realty Co.* 654

APPLIANCES:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 6.

APPLICATION:

For writ of review, time for, see CERTIORARI.

For receiver for partnership, description of property, see PARTNERSHIP, 2.

To purchase tide lands, see PUBLIC LANDS, 1.

APPOINTMENT:

Of official court stenographers, validity of act, see CONSTITUTIONAL LAW, 5.

Of receiver, see RECEIVERS, 1.

APPORTIONMENT:

Of school funds, mandamus to compel, see MANDAMUS.

Of school funds, see SCHOOLS AND SCHOOL DISTRICTS.

ARCHITECTS:

Acceptance of work under state contract, see STATES, 1-3.

ARGUMENT OF COUNSEL:

In civil actions, see TRIAL, 1.

ARREST:

For debt, see BAIL.

Liability of officers for arrest and detention of suspected delinquent, see CONSTITUTIONAL LAW, 7.

Illegal arrest, see FALSE IMPRISONMENT, 2.

Habeas corpus to admit to bail pending appeal from order to vacate arrest, see HABEAS CORPUS.

ASSAULT:

See CRIMINAL LAW, 9.

ASSAULT AND BATTERY:

1. ASSAULT AND BATTERY—INSTRUCTIONS—DEGREES OF ASSAULT—EVIDENCE. Under Rem. & Bal. Code, §§ 2413, 2414, and 2415, defining assault in the first and second degrees as assaults with intent to kill, or to willfully inflict grievous bodily harm with a weapon likely to produce bodily harm, and in the third degree as an assault not amounting to the first and second degrees, upon a prosecution for first degree assault, an accused who admits that she shot at a person with intent to hit him, is not entitled to an instruction upon the subject of third degree assault, as there was no evidence to warrant it. *State v. McConaghy*..... 168

2. ASSAULT AND BATTERY—SELF-DEFENSE—DUTY TO WITHDRAW. An aggressor in an affray cannot invoke the doctrine of self-defense unless she in good faith sought and endeavored to withdraw from and abandon the conflict. *State v. McConaghy*..... 168

ASSENT:

To account rendered, see ACCOUNT STATED, 1, 3, 4.

ASSESSMENT:

Of compensation for property taken or injured for public use, see EMINENT DOMAIN, 8.

Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 14-19.

Of tax, see TAXATION.

Covenants as to payment by vendee, see VENDOR AND PURCHASER, 1, 2.

ASSIGNMENTS:

Of sheriff's certificate of sale, see EXECUTION, 3, 4.

Entry of judgment against assignee for collection, see JUDGMENT, 3.

1. ASSIGNMENTS — CONSIDERATION — ACTION BY ASSIGNEE. Proof of consideration for an express assignment in writing is not necessary, and the assignee being vested with legal title, may sue in his own name, although the assignors retained an interest, under Rem. & Bal. Code, § 191. *Yamamoto v. Puget Sound Lumber Co*..... 411

2. ASSIGNMENTS — EXECUTION — EVIDENCE — SUFFICIENCY. There is sufficient evidence of proofs of the assignment of losses of several assignors, where the names of the assignors appear on the written assignment introduced in evidence, and they testified that they made such assignment; or where one assignor was allowed to testify, without objection, to the goods lost by him, included in the list, and no objection was made to the assignment for want of authentication. *Yamamoto v. Puget Sound Lumber Co*..... 411

ATTORNEY AND CLIENT:

Attorney's fees in action for divorce, see DIVORCE, 12.
Power of state board of medical examiners to employ private counsel, see STATES, 4, 5.
Argument and conduct of counsel at trial in civil actions, see TRIAL, 1.

AUTHORITY:

Liability of broker on making sale beyond authority, see BROKERS.
Of corporate officers or agents, see CORPORATIONS, 1.
Of cities to condemn lands for supplying water system, see EMINENT DOMAIN, 1, 2.
Of insurance adjuster, see INSURANCE, 3.
Of agent, see PRINCIPAL AND AGENT, 1.

AUTOMOBILES:

Collision with in city street, see MUNICIPAL CORPORATIONS, 20-22.

AWARD:

Of property on divorce, see DIVORCE, 9-11.

BAIL:

Habeas corpus to admit to bail, see HABEAS CORPUS.

1. BAIL—RIGHT TO—CONSTITUTIONAL LAW — ARREST FOR DEBT — APPEAL. A judgment debtor in a civil action, arrested on a personal execution, who appealed from the order denying his motion to vacate the order of arrest, is entitled to be admitted to bail pending the appeal, where the right to execute the judgment by arrest was questioned under Const., art. 1, § 17, providing that there shall be no imprisonment for debt except in cases of absconding debtors. *State ex rel. Syverson v. Foster*..... 58

2. SAME — RIGHT TO BAIL — CONSTITUTIONAL PROVISIONS. In such cases, the right to admission to bail pending appeal does not depend on statutory provisions, since the right of personal liberty is a natural right, of which the right to habeas corpus is guaranteed by the constitution, as is the right of appeal with all its incidents and privileges. *State ex rel. Syverson v. Foster*..... 58

BAILMENT:

Embezzlement or larceny by bailee, see EMBEZZLEMENT.

1. BAILMENT—LIABILITY OF BAILEE—NEGLIGENCE. Upon a bailment of a team of horses for hire, with a driver furnished by the owner, whom the bailee put at other work, the bailee is liable for negligence of his own driver in the handling of the horses. *Kingsley v. Standard Lumber Co*..... 189

2. BAILMENT—NEGLIGENCE—BURDEN OF PROOF — PRESUMPTIONS. Evidence that horses, hired to a bailee, were in good condition at the

BAILMENT—CONTINUED.

time of the bailment, and that one was returned in bad condition and the other not at all, raises a presumption of negligence on the part of the bailee, and shifts the burden of proof, in an action by the owner to recover damages. *Kingsley v. Standard Lumber Co.*. 189

BANKRUPTCY:

Modification of decree in form as personal judgment against trustee, see APPEAL AND ERROR, 33.

BAR:

Of action by former prosecution, see CRIMINAL LAW, 4-6.
Of action by former adjudication, see JUDGMENT, 9-15.

BEST AND SECONDARY EVIDENCE:

In civil actions, see EVIDENCE, 1.

BILL OF LADING:

Transfer of title to goods, see SALES, 4, 5.

BILLS AND NOTES:

Failure of consideration for note, see SALES, 6.
Holder in due course as question for court, see TRIAL, 4.

1. BILLS AND NOTES—HOLDER IN DUE COURSE. A negotiable promissory note, indorsed and transferred by the payee to a creditor on an open account and accepted and applied by the creditor on the account as a *pro tanto* payment thereof, without any knowledge on the indorsee's part of any fraud in its inception, and without any showing of facts from which bad faith might be implied, constitutes the indorsee a holder in due course, and entitled to enforce the note against the makers thereof. *McLaughlin v. Dopps*..... 442

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see BILLS AND NOTES.
At execution sale, see EXECUTION, 2.
At partition sale, see JUDICIAL SALES, 2.
Of goods, see SALES, 5.

BONDS:

On appeal, time for filing, see APPEAL AND ERROR, 9.
Supersedeas on appeal from order adjudging contempt for failure to pay alimony, see DIVORCE, 13, 14.
Contractor's bonds, see MUNICIPAL CORPORATIONS, 3.
Municipal bonds, see MUNICIPAL CORPORATIONS, 25-27.
To secure performance of state contract, see STATES, 1.

BOUNDARIES:

See WATERS AND WATER COURSES, 5.
Of highway following shore line, see HIGHWAYS, 1.

BREACH:

Of contract of sale, see SALES, 9.
Of contract for sale of land, see VENDOR AND PURCHASER, 3-5.

BROKERS:

See PRINCIPAL AND AGENT, 2.

1. BROKERS — LIABILITIES — RETURN OF MONEY. Where an option holder on a tract of land arranged with a broker for its sale in parcels in case he should secure title or make satisfactory arrangements with the owner, and delivered to the broker sale contracts executed in blank with the understanding that they were merely tentative, and the broker made sale of a tract without his principal having secured title, the broker is liable upon his promise to the would-be purchaser for a refund of the money paid, since his act in making sale beyond his authority was sufficient consideration for the promise. *Smith v. Orr Co*..... 561

BUILDINGS:

Contract for state buildings, see STATES, 1-3.
Subscribers to fund for, see SUBSCRIPTIONS.

BURDEN OF PROOF:

See ACCOUNT STATED, 1.
Negligence of bailee, see BAILMENT, 2.
To show presentment of claim for damages in carriage of live stock, see CARRIERS, 2.

CANCELLATION:

Enjoining cancellation of insurance agent's license, see INJUNCTION, 1.
Of preference rights to purchase tide lands, see PUBLIC LANDS, 2, 3.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see SALES, 2, 3.
Setting aside tax lien, see TAXATION, 3, 4.

CAPACITY TO SUE:

Waiver of objections on appeal, see APPEAL AND ERROR, 4.

CARRIERS:

Delivery of goods to carrier, see SALES, 4, 5.

1. CARRIERS—CARRIAGE OF LIVE STOCK—ACTIONS—LIMITATION OF LIABILITY. A stipulation in a contract for the shipment of live stock, rendering claims for loss, injury or damage invalid unless presented in writing within thirty days after the same shall have occurred, is not a contract exempting the company from liability, within Rem. & Bal. Code, § 8648, providing that no contract or regulation shall exempt any corporation engaged in transporting live stock by railway

CARRIERS—CONTINUED.

from liability of a common carrier of live stock which would exist had no contract, etc., been entered into. *Henry v. Chicago, Milwaukee & Puget Sound R. Co*..... 633

2. CARRIERS—CARRIAGE OF LIVE STOCK—ACTIONS—BURDEN OF PROOF. A contract requiring claims for damages arising from the transportation of live stock by common carriers to be presented within thirty days fixes a condition precedent to right of recovery, and thus imposes the burden of proving the presentment of such claim on the party seeking damages under such a contract of carriage; hence nonsuit is proper, where plaintiff's evidence failed to show the presentation of such a claim, the contract being before the court at the time. *Henry v. Chicago, Milwaukee & Puget Sound R. Co*..... 633

CERTAINTY:

In charging offense, see INDICTMENT AND INFORMATION, 1.
Of contract of lease, see LANDLORD AND TENANT, 1.
Of contract, see SPECIFIC PERFORMANCE, 1.

CERTIFICATE:

At sheriff's sale as color of title, see ADVERSE POSSESSION, 2.
Of sale, assignment of, see EXECUTION, 3, 4.
Of architect as to completion of state building, see STATES, 1-3.

CERTIORARI:

1. CERTIORARI—APPLICATION FOR WRIT—TIME. An application for a writ of certiorari to review a decree of foreclosure is not timely when made more than ninety days subsequent to the entry of the decree, since it must be made within the time limited for appeals from judgments. *State ex rel. Jakubowski v. Superior Court*... 663

CESSATION OF WORK:

Temporary cessation of work as affecting priority of lien by relation, see MECHANICS' LIENS.

CHALLENGE:

Failure to exercise opportunity to challenge account rendered, see ACCOUNT STATED, 4.

CHANGE:

In plan of public improvement, see MUNICIPAL CORPORATIONS, 6-12.
In plan of building as avoiding liability of subscriber to fund, see SUBSCRIPTIONS.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 7, 9.
To jury in civil actions, see TRIAL, 2, 3.

CHATTEL MORTGAGES:

1. CHATTEL MORTGAGES—FAILURE TO RECORD—LABOR LIENS—PRIORITY—STATUTES—CONSTRUCTION. Although, under Rem. & Bal. Code, § 3660, providing that a chattel mortgage is void as against creditors unless recorded, a tardily recorded mortgage is prior to the rights of subsequent general creditors who have not acquired a specific lien on the property prior to the recording, a labor creditor performing labor during the interim between the execution and tardy recording of a chattel mortgage has an inchoate right of lien upon the specific property used in the operation of the business in which the labor was performed, for a period of ninety days after ceasing work, as provided and accorded to him by Id., §§ 1149, 1150; especially in view of Id., § 1153, which provides that the receiver or assignee of the debtor in such cases shall "pay all claims for which a lien could be filed" under the labor lien law before the payment of other debts; therefore, such labor liens, when matured by a receivership within the ninety-day period for perfecting the lien, stand upon a different footing from that of general creditors, and are superior to the lien of the chattel mortgage, of which the claimants had no notice when the labor was performed. *Olsen v. Smith*..... 228

2. SAME. The fact that Rem. & Bal. Code, § 1132, declares that a mechanics' lien is preferred to an incumbrance attaching *subsequent to the commencement of the work* for which the lien is given, and also to any incumbrance which may have attached *previously to the time* and was not filed for record until after that time, of which the lien claimant has no notice, has no like restrictive bearing, as to prior unrecorded chattel mortgages, on the later act, Id., § 1149, which accords a lien for labor performed within six months next preceding the filing of the claim of lien, and declares that "no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien;" since the terms of the later act are even broader and capable of giving the labor lien precedence over all prior mortgages, although it has been construed as not intended to give to labor liens a right of priority over mortgages executed prior to the time of the commencement of the work for which the lien was filed. *Olsen v. Smith*..... 288

CHILD:

Liability of officers for arrest and detention of suspected delinquent, see CONSTITUTIONAL LAW, 7.

Inheritance by collateral heirs, see DESCENT AND DISTRIBUTION.

Detention of suspected delinquent child, see FALSE IMPRISONMENT, 1, 2.

Negligence of guardian *ad litem*, see GUARDIAN AND WARD.

Exercise of guardianship by state, see INFANTS.

CHOSE IN ACTION:

Assignment, see ASSIGNMENTS.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Equal protection of laws, see CONSTITUTIONAL LAW, 2-5.
Privileges and immunities, see CONSTITUTIONAL LAW, 3.

CLAIM OF RIGHT:

Possession of land under, see ADVERSE POSSESSION, 1.

CLAIMS:

Against city, amendment of as harmless error, see APPEAL AND ERROR, 28.
For damages in carriage of live stock, see CARRIERS.
Against contractor's bond, notice of, see MUNICIPAL CORPORATIONS, 3.
Against city, see MUNICIPAL CORPORATIONS, 28, 29.
Against state, see STATES, 1.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 2-5.

COLLISION:

With automobile in city street, see MUNICIPAL CORPORATIONS, 20-22.

COLOR OF TITLE:

To sustain adverse possession, see ADVERSE POSSESSION, 2.

COMMENT:

By newspaper during pendency of action, see CONTEMPT.
On facts in charge to jury, see TRIAL, 2.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMUNITY PROPERTY:

Division of on divorce, see DIVORCE, 9.

COMPENSATION:

Attorney's fees in action for divorce, see DIVORCE, 12.
For property taken or damaged for public use, see EMINENT DOMAIN, 5-8.
For change in plan of improvement, see MUNICIPAL CORPORATIONS, 6-8, 10, 11.

COMPETENCY:

Of witnesses in general, see WITNESSES.

COMPLAINT:

In criminal prosecutions, see INDICTMENT AND INFORMATION.
In civil actions, see PLEADING, 2, 4.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITION:

Precedent to action for damages in carriage of live stock, see CARRIERS.
Precedent to enforcement of contract, see SPECIFIC PERFORMANCE, 2.
Precedent to action to cancel tax, see TAXATION, 3.

CONDITIONAL SALES:

See SALES, 7-10.

CONDUCT:

Of guardian *ad litem*, see GUARDIAN AND WARD.
Of jury ground for new trial, see NEW TRIAL, 1.
Of counsel at trial of civil action, see TRIAL, 1.

CONFIDENTIAL RELATIONS:

Disclosure of communications, see WITNESSES, 1.

CONFIRMATION:

Of partition sale, see JUDICIAL SALES, 1.

CONSENT:

As waiving right to review, see APPEAL AND ERROR, 3.
To entry of judgment, see JUDGMENT, 5, 6.

CONSIDERATION:

Of assignment, see ASSIGNMENTS, 1.
Failure of, see SALES, 6.

CONSTITUTIONAL LAW:

Right to bail, see BAIL.
Detention of delinquent child as denial of liberty without due process of law, see FALSE IMPRISONMENT, 1.
Subjects and titles of statutes, see STATUTES, 1.
Uniformity, see TAXATION, 1, 2, 5.

1. CONSTITUTIONAL LAW — LEGISLATIVE POWERS — INFRINGEMENT BY COURTS—ACTS—TIME OF TAKING EFFECT—DETERMINATION OF EMERGENCY. The legislative declaration that an act is necessary for the immediate preservation of the public peace, health or safety, or support of the state government and its existing institutions, and shall take effect immediately, thereby cutting off the people's right of referendum, is subject to review by the courts, and will be held unconstitutional where the law, on its face, shows that the declaration is false, although, if the act be doubtful, the question of emergency will be treated as a legislative question and the act upheld; in view of the initiative and referendum amendment to the constitution (Laws 1911, p. 136), providing that the people reserve to

CONSTITUTIONAL LAW—CONTINUED.

themselves the power to propose and enact laws, independent of the legislature, and to approve or reject, by the power of referendum, any act passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety or support of the state government and its existing institutions, which amendment repeals Const., art. 2, § 31, providing that no law except appropriation bills shall take effect until ninety days after adjournment, unless in case of emergency, which emergency shall be expressed in the act, and provides in lieu thereof that no law subject to referendum shall take effect until ninety days after adjournment (the time within which the referendum may be invoked); taking into consideration the old law, the mischief, and the remedy, and the fact that the constitution leaves no room for the exercise of discretion by the legislature in the given cases. *State ex rel. Brislawn v. Meath* 302

2. CONSTITUTIONAL LAW—SPECIAL LEGISLATION—FOOD—REGULATION—STOCK FOOD—STATUTES. Rem. & Bal. Code, §§ 6011-6022, regulating the sale of "concentrated commercial feeding stuffs" and defining the same as including "wheat bran, wheat middlings, wheat shorts . . . mixed feeds and mixed meals made from seeds or grains," etc., is invalid as violating the inhibition of the state constitution (art. 1, § 12), against class legislation; inasmuch as it exempts from the operation of the act cereal or flouring mills, permitting them to sell "mill bran, shorts, or middlings made in the regular process of manufacturing cereal or flour," without complying with the statutory regulations therein provided, while all others selling the same class of feed are required to submit thereto. *State v. Robinson Co.* 246

3. SAME. The act cannot be held valid by interpolating the word "only" in section 13 (Rem. & Bal. Code, § 6022), exempting cereal and flouring mills selling "only" mill bran, etc., as no such intention appears. *State v. Robinson Co* 246

4. SAME—FOOD—REGULATION—STATUTES — PARTIAL INVALIDITY. The act cannot be held valid by the exclusion of § 13 thereof (Rem. & Bal. Code, § 6022), the section exempting cereal or flouring mills; since said section is a material part of the act, and to hold this section void and the balance of the act valid would be determining that the act applies to all persons dealing in such feed stuffs, when the legislature has expressly declared to the contrary. *State v. Robinson Co.* 246

5. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—CLASS LEGISLATION—COURT STENOGRAPHER — STATUTE AUTHORIZING APPOINTMENT. 3 Rem. & Bal. Code, § 42-13, excluding from the operation of the act for the appointment of official court stenographers counties containing a population of 200,000, is not such an arbitrary classification of the counties as to constitute a violation of the constitutional pro-

CONSTITUTIONAL LAW—CONTINUED.

visions designed to secure the equal protection of the laws and to prevent class legislation. *State ex rel. Vance v. Frater*..... 466

6. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—DUE PROCESS OF LAW. The horticultural inspection law, authorizing the state commissioner of horticulture to declare what pests are injurious to horticultural products, and to destroy infected products after notice, is not invalid as violating either the constitutional guaranty of due process of law, or the inhibition against the delegation of legislative power. *Los Angeles Berry Growers' Co-Operative Association v. Huntley*..... 155

7. CONSTITUTIONAL LAW—LIBERTY—DUE PROCESS—FALSE IMPRISONMENT—DELINQUENT CHILDREN—UNLAWFUL DETENTION—LIABILITY OF OFFICERS. The purpose of the juvenile delinquency act being protection, and not punishment, an officer arresting and detaining a person thought to be a delinquent child, without any complaint being filed or summons issued therefor as required by the act (Rem. & Bal. Code, § 1991), is not guilty of false imprisonment, as a matter of law, in that the restraint was without due process of law; but whether the officer acted wrongfully to serve a purpose inconsistent with the purposes of the act would be a question for the jury under proper instructions; in view of the duty of the state to act as *parens patriae*, and the common law powers of courts of chancery in aid of the statute for the exercise of the state's guardianship over infants (overruling on rehearing Id., 81 Wash. 668). *Weber v. Doust* 330

CONSTRUCTION:

Of contract, see CONTRACTS, 1; TRUSTS.

Of statutes relating to priority of labor liens, see CHATTEL MORTGAGES.

Of act to regulate standard of insurance rates, see INSURANCE, 1.

Of contract for insurance, see INSURANCE, 2.

Of workmen's compensation act, see MASTER AND SERVANT, 4.

Of act relating to placing of female in house of prostitution, see PROSTITUTION, 1.

Of order appointing receiver, see RECEIVERS, 1.

Of statutes, see STATUTES, 3, 4.

Of contract for sale of land, see VENDOR AND PURCHASER, 1, 2.

CONTEMPT:

For failure to pay alimony, see DIVORCE, 13, 14.

1. CONTEMPT—NEWSPAPER COMMENT—PENDENCY OF COURT PROCEEDINGS—NECESSITY. Where the fish commissioner, cited to appear and testify before the grand jury, for his own protection secured an order of court directing him to appear and testify or show cause why he should not be punished for contempt, to which order he assented, the matter of his giving testimony was fully adjudicated and de-

CONTEMPT—CONTINUED.

termined, and no controversy was pending; hence subsequent newspaper comment thereon, prior to the giving of the testimony, which would have been contumacious if an action had been pending at the time of the publication, is not contempt of court. *State v. Sefrit* 345

2. SAME — PREJUDICE TO PARTY — REASONABLE DOUBT. Constructive contempt by newspaper comment on judicial proceedings requires that the matter must have a reasonable tendency to prejudice a party to a pending action, or substantially interfere with the administration of justice; and being *quasi* criminal, every reasonable doubt must be resolved in favor of the accused. *State v. Sefrit* 345

CONTRACTORS:

Bonds on public work, see MUNICIPAL CORPORATIONS, 3.
On public work, see MUNICIPAL CORPORATIONS, 3-13, 19.

CONTRACTS:

See BILLS AND NOTES; CORPORATIONS, 1; INDEMNITY; INSURANCE, 1-4; SALES; SUBSCRIPTIONS; TRUSTS; WORK AND LABOR.
Carriage of live stock, see CARRIERS.
Parol evidence to vary written contract, see EVIDENCE, 3-7.
Leases, see LANDLORD AND TENANT.
For public improvements, see MUNICIPAL CORPORATIONS, 2-13, 19, 23.
Between principal and agent, see PRINCIPAL AND AGENT, 2.
Specific performance, see SPECIFIC PERFORMANCE.
By state, see STATES, 1-3.
Sales of realty, see VENDOR AND PURCHASER.

1. CONTRACTS — CONSTRUCTION — AMBIGUITY. In a contract partly written on a printed form, more attention is paid to the written than to the printed part. *Eighme v. Holcomb*..... 145

2. CONTRACTS—CONSTRUCTION—EXPERT OPINION—QUESTION FOR JURY. Where a contract for construction work was of doubtful interpretation, and the opinions of experts differed thereon, raising a substantial conflict in the evidence, a question for the jury, rather than the court, is presented as to the proper interpretation, and their verdict thereon is conclusive. *Kieburtz v. Seattle*..... 196

CONTRIBUTION:

Promises to contribute, see SUBSCRIPTIONS.

CONTRIBUTORY NEGLIGENCE:

Of servant, see MASTER AND SERVANT, 7.
Of person injured on street, see MUNICIPAL CORPORATIONS, 21-22.

CONVEYANCES:

See ASSIGNMENTS; CHATTEL MORTGAGES.
Sheriff's, see EXECUTION, 3, 4.
Of state lands, see PUBLIC LANDS.
In trust, see TRUSTS.
Contracts to convey, see VENDOR AND PURCHASER.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.

Capacity to sue, waiver of objection, see APPEAL AND ERROR, 4.

Acquisition of property by condemnation, see EMINENT DOMAIN, 1-4, 6, 7.

Taxation of corporations and corporate property, see TAXATION.

1. CORPORATIONS—REPRESENTATION—AGENTS—CONTRACTS—AUTHORITY OF AGENT. A trust company authorized a director to incur certain expenses in the alteration of certain portions of its building, and is liable therefor, where it appears that, at a meeting of the board, the director was requested to present plans and an estimate of the cost, and when this was done about two weeks later, at another meeting, he was authorized to go ahead, the trust company assuming the expense, which it approved and paid in excess of the estimates, and the only action taken with reference to a demand for the balance was to postpone action until a day certain, no denial of liability being made prior to the appointment of a receiver; and it is immaterial that the director had a lease of other portions of the building for hotel purposes, the alterations in question relating to portions of the building not leased to him. *Boyce v. Campbell* 64

2. CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE—EVIDENCE—SUFFICIENCY. Where a foreign mercantile corporation, being a creditor, purchased a bankrupt stock of goods from the trustee in bankruptcy and conducted the business of selling it off at retail through its sales agents, adding other goods to the stock from time to time, it was a foreign corporation doing business in this state; and it cannot be claimed that the goods were merely delivered to the retail agents for sale on consignment, where their only authority was to sell at retail and deposit the proceeds and the corporation financed the business, retained absolute control of the goods, and made no bill of sale or instrument to secure the alleged purchase price. *Spokane Merchants Association v. Clere Clothing Co.* 616

3. SAME—FOREIGN CORPORATIONS—PROCESS—SERVICE—PRESIDENT AS AGENT. Service of a summons on the president of a foreign corporation doing business in this state, while he was temporarily in the state looking after its interests, is authorized by Rem. & Bal. Code, § 226, subd. 9, providing that, in case of foreign corporations, service of summons may be made by delivery to "any agent, cashier or secretary thereof"; since the president was "an agent" of the corporation. *Spokane Merchants Association v. Clere Clothing Co.*..... 616

COSTS:

Attorney's fees in divorce case, see DIVORCE, 12.

Condemnation proceedings, see EMINENT DOMAIN, 9.

1. COSTS—MILEAGE—WITNESSES. The mileage and per diem fees for witnesses at the statutory rate are properly taxed as costs although

COSTS—CONTINUED.

they were employees of the prevailing party and traveled free at such party's expense; especially where the loss of their employment, their maintenance, and expense in transportation would be no more than repaid by the allowance of those items. *Henry v. Chicago, Milwaukee & Puget Sound R. Co*..... 633

COUNTIES:

Operation of ferry, see FERRIES.
Liability to third persons for acts of independent contractors engaged in dangerous work, see MASTER AND SERVANT, 8.
Apportionment to of state school funds, see SCHOOLS AND SCHOOL DISTRICTS.
Assessment of railroad property, see TAXATION, 3, 4.
Use of wharf as approach to ferry, see WHARVES.

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.
Review of legislative declaration as to emergency acts, see CONSTITUTIONAL LAW, 1.
Contempt of court, see CONTEMPT.
Duty to instruct in criminal prosecution, see CRIMINAL LAW, 7.
Condemnation proceedings, see EMINENT DOMAIN.
Power to grant writ of habeas corpus to admit to bail pending appeal, see HABEAS CORPUS.
Prohibition to courts, see PROHIBITION.
Province of court and jury, see TRIAL, 4.
Trial by court without jury, findings, see TRIAL, 6.

COVENANTS:

In leases, rights of mortgagees, see LANDLORD AND TENANT, 2.
Of warranty in deed in escrow, see VENDOR AND PUCHASER, 1, 2.

CREDITORS:

Rights as to chattel mortgage by debtor, see CHATTEL MORTGAGES.
Rights under conditional sales contract, see SALES, 8.

CRIMINAL LAW:

See ASSAULT AND BATTERY; CONTEMPT; EMBEZZLEMENT; FALSE PRETENSES; ROBBERY.
Habeas corpus to obtain release, see HABEAS CORPUS.
Indictment, information, or complaint, see INDICTMENT AND INFORMATION.
Placing female in house of prostitution, see PROSTITUTION.
Titles and subjects of criminal acts, see STATUTES, 1.
Competency of witnesses, see WITNESSES, 1.

1. CRIMINAL LAW—EVIDENCE—OTHER CRIMES. In a prosecution for grand larceny by false pretenses in that accused procured a bill of

CRIMINAL LAW—CONTINUED.

sale of certain property by giving in exchange a deed to lots he did not own and a check on a bank where he had no funds, evidence that the bill of sale was altered after execution so as to include additional property is inadmissible, under the rule forbidding the admission of evidence of other crimes than the one charged in the information. *State v. Moore*..... 263

2. SAME—EVIDENCE—PREVIOUS CONVICTIONS. In a prosecution of an habitual criminal, under an information charging him as twice previously convicted of a felony, it is not error to admit evidence of three previous convictions. *State v. Rowan*..... 158

3. SAME—EVIDENCE—ADMISSIBILITY OF CERTIFIED RECORD. Upon a prosecution for being an habitual criminal, proof of an original conviction of robbery in another state by a certified copy of the record thereof is expressly authorized by Rem. & Bal. Code, § 1254, relating to the proof of records and proceedings of any court of any of the states of the United States. *State v. Rowan*..... 158

4. CRIMINAL LAW — FORMER JEOPARDY — STATUTES—IMPLIED REPEAL. Rem. & Bal. Code, § 2113, providing that a conviction or acquittal by a judgment upon a verdict shall be a bar to another prosecution for the same offense, notwithstanding a defect in form or substance in the former charge, is hostile to, and therefore impliedly repealed by, the later enactment of Id., § 2316, of the "penal code" providing that no order of dismissal or directed verdict of not guilty . . . on the ground of any defect in such indictment or information shall bar another prosecution for the same offense; even if it is not expressly repealed by Id., § 2304, repealing all acts "in conflict herewith." *State v. George*..... 113

5. CRIMINAL LAW—FORMER JEOPARDY—INSUFFICIENT CHARGE. In the absence of statute, there could be no lawful conviction or acquittal upon an information or indictment which was insufficient to state an offense, and hence no plea of former jeopardy thereon. *State v. George* 113

6. SAME—FORMER JEOPARDY—WAIVER OF PLEA. Where a conviction is set aside on appeal by the accused, he cannot, upon a subsequent charge for the same offense, urge the former conviction as a bar or set up the plea of former jeopardy. *State v. George*..... 113

7. CRIMINAL LAW—TRIAL—FAILURE TO INSTRUCT. Rem. & Bal. Code, § 2148, making it the duty of the court to instruct that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf, is mandatory, and failure to do so is reversible error. *State v. Hanes*..... 601

8. CRIMINAL LAW—HABITUAL CRIMINALS—INDICTMENT AND INFORMATION—SUFFICIENCY. An information charging the accused with being an habitual criminal, under Rem. & Bal. Code, § 2286, need not

CRIMINAL LAW—CONTINUED.

negative the fact that the previous convictions had not been annulled or set aside, as that is matter of defense; since the statute simply provides that persons previously twice convicted shall be habitual criminals, without reference to any annulment of the previous convictions. *State v. Rowan*..... 158

9. CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. It is proper to refuse to instruct that it is not incumbent upon one assaulted upon her own premises to retreat before availing herself of the right of self-defense, where it appears that she was not assaulted upon her own premises; especially in view of other full and correct instructions touching her right of self-defense. *State v. McConaghy* 168

10. CRIMINAL LAW—APPEAL—REVERSAL—EFFECT. Upon reversing a conviction for insufficiency of the information, an order directing the dismissing of the cause, instead of remanding the case for further proceedings under Rem. & Bal. Code, § 1749, does not affect the rights of the accused, or prevent his subsequent arrest and trial upon a sufficient information. *State v. George*..... 113

CROPS:

Horticultural products, inspection of, see AGRICULTURE.

CRUELTY:

Ground for divorce, see DIVORCE, 1, 2, 5.

DAMAGES:

Remission of as curing error, see APPEAL AND ERROR, 27.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 5-8.
For fraud, see FRAUD, 2, 3.
Right of contractor to recover over against city for damages paid injured employee, see INDEMNITY.
Claims for, amendment, see MUNICIPAL CORPORATIONS, 28, 29.

DEATH:

Of employee, see MASTER AND SERVANT, 7.

DEBT:

Arrest for, right to bail pending appeal, see BAIL.
Limitation of public debt, see MUNICIPAL CORPORATIONS, 23, 24.

DEBTOR AND CREDITOR:

Execution sales, see EXECUTION.

DECEDENTS:

Estates, see DESCENT AND DISTRIBUTION.
Testimony as to transactions with, see WITNESSES, 2.

DECLARATIONS:

Of homestead, see HOMESTEAD.

DEDICATION:

See HIGHWAYS, 3.

DEEDS:

Sheriff's, see EXECUTION, 3, 4.
In escrow, on sale of land, see VENDOR AND PURCHASER, 1.

DEFAULT:

Judgment by, vacation, see JUDGMENT, 1.
Of vendee in conditional sale contract, see SALES, 10.
In payments due on land contract, see VENDOR AND PURCHASER, 4.

DEFECT:

In material used in public improvement, see MUNICIPAL CORPORATIONS, 13.
Of parties plaintiff, waiver, see PARTIES.

DEGREES:

Of offense, instructions, see ASSAULT AND BATTERY, 1.

DELEGATION:

Of right to architect to accept state building, see STATES, 2.

DELINQUENT CHILD:

Detention of as deprivation of liberty without due process of law, see CONSTITUTIONAL LAW, 7.
Detention of without process, see FALSE IMPRISONMENT, 1, 2.

DELIVERY:

Of goods sold, see SALES, 4, 5.

DEMONSTRATIVE EVIDENCE:

In civil actions, see EVIDENCE, 2.

DEMURRER:

In pleading, see PLEADING, 1.

DEPOSITIONS:

1. DEPOSITIONS—EXAMINATION OF WITNESS — ANSWERS — RESPONSIVENESS. An answer to a cross-interrogatory in a deposition as to the condition in which the witness found the vital organs of the deceased when he performed the autopsy, is properly excluded as not responsive, where the answer only stated the conclusion of the witness that the condition of the organs was the same as would be caused by chronic alcoholism and that the odor of alcohol was present. *Independent Order of Foresters v. Bonner*..... 13

DEPOSITS:

To meet payments due on land contract, after default by vendee, see VENDOR AND PURCHASER, 3.

DESCENT AND DISTRIBUTION:

1. DESCENT AND DISTRIBUTION—COLLATERAL HEIRS—CHILDREN OF DECEASED SISTER. Inheritance by collateral heirs is confined to "children," excluding grandchildren of collateral heirs of the deceased, under Rem. & Bal. Code, § 1341, subd. 3, providing that, where there is no issue, nor husband, wife, father nor mother, the estate of an intestate shall descend "in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation," in view of the fact that the word "children" in laws of descent is not construed to include "grandchildren," and the fact that this section distinguishes between "issue" and "children," authorizing inheritance *in infinitum* only by direct heirs; and this construction is not affected by Id., § 1328, providing for descent to "lineal descendants" in estates devised by will to collateral heirs. *In re Roberts' Estate*..... 163

DESCRIPTION:

Of property in application for receiver, see PARTNERSHIP, 2.

DETENTION:

Of delinquent child as deprivation of liberty without due process of law, see CONSTITUTIONAL LAW, 7.

Liability of officer for detention of delinquent child without process, see FALSE IMPRISONMENT, 1, 2.

DILIGENCE:

In procuring newly discovered evidence, see NEW TRIAL, 2, 3.

DISCRETION OF COURT:

Review of discretion in ruling on motion for new trial, see APPEAL AND ERROR, 18, 19.

Revocation of order awarding alimony to wife, see DIVORCE, 8.

Admission of demonstrative evidence, see EVIDENCE, 2.

Division of community property on divorce, see DIVORCE, 9.

Striking new matter in reply, see PLEADING, 3.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 9.

Dismissal of appeals from board of land commissioners, for delay in prosecution, see PUBLIC LANDS, 2, 3.

DISSOLUTION:

Of partnership, see PARTNERSHIP, 2, 3.

DISTRIBUTION:

Of estate of decedent, see DESCENT AND DISTRIBUTION.

DIVISION:

Of property on divorce, see DIVORCE, 9-11.

DIVORCE:

Prohibition, pending appeal, to prevent enforcement of order adjudging contempt for failure to pay alimony, see PROHIBITION, 2.

Competency of divorced wife to testify against former husband, see WITNESSES, 1.

1. DIVORCE—GROUNDS—CRUELTY—EVIDENCE—SUFFICIENCY. A decree of divorce in favor of the wife on the ground of cruel treatment and awarding custody of their child to her, is warranted where the evidence shows that the husband was a man of ungovernable temper and often applied to his wife language and epithets to which no woman ought to be subjected, and though sharply contradictory, tends to show that the husband from the start took a domineering and uncompromising attitude toward his wife, displayed little tact or consideration in his relations toward her, and sometimes threatened physical violence, though never actually inflicting it. *Willson v. Willson* 240

2. DIVORCE—GROUNDS—PLEADING—SUFFICIENCY OF CROSS-COMPLAINT. A cross-complaint for divorce by a husband sufficiently states the statutory grounds of cruel treatment and personal indignities rendering life burdensome, where it alleges that, for twelve years after marriage, their relations were agreeable; that, upon a voyage by the wife to the Philippines, she made the acquaintance of certain men, and that thereafter her disposition and conduct toward defendant were utterly changed, and instead of love and affection she manifested only hatred and aversion for her husband, denying to him his marital rights and exhibiting a cold-blooded avarice which she had never shown before, and that she was thereafter more susceptible to the blandishments of other men and maintained correspondence with other men of the most improper nature. *Glenn v. Glenn*..... 215

3. DIVORCE—GROUNDS—IMPROPER CONDUCT—EVIDENCE — SUFFICIENCY. A decree of divorce in favor of the husband is sustained by evidence in the form of original letters, and copies of letters, where the originals were not produced on demand, written by other men to his wife, tending to show a libidinous disposition toward the wife on the part of such correspondents, and where it appeared that she took pleasure in the society of such men and apparently made no effort to cause the correspondence to cease. *Glenn v. Glenn*.... 215

4. DIVORCE—DEFENSES—RESULT OF DIVORCE. Where a wife brings an action for a divorce and fails to prove her case, it is no objection to a divorce in favor of the husband on his cross-complaint, or ground for granting her a divorce, that the grounds for the hus-

DIVORCE—CONTINUED.

band's divorce cast a stigma upon her name and brand her as a woman of bad moral character; as she instituted the proceedings and must abide by the result. *Glenn v. Glenn*..... 215

5. DIVORCE — DECREE — FORM — APPEAL — HARMLESS ERROR. Where plaintiff is granted a divorce on the ground of defendant's cruelty, plaintiff, on appeal, cannot assign error in also granting the defendant a divorce on the ground of plaintiff's cruelty; inasmuch as both are necessarily divorced by the decree for plaintiff. *Schirmer v. Schirmer* 1

6. SAME—ALIMONY—SUPPORT OF CHILDREN—SUFFICIENCY. An award of $30 a month to support three children, aged 16, 12, and 6 years, will not be set aside as inadequate, where the oldest, a boy, was industrious and had saved $285 from his own earnings, and there was nothing in the record to show that, at present, $30 was not sufficient for the other two. *Schirmer v. Schirmer*..... 1

7. DIVORCE — ALIMONY — MODIFICATION — CHANGE OF CONDITION. A change in the financial circumstances of a former husband, warranting a modification of a decree for monthly alimony, is sufficiently shown where it appears that, on granting the divorce, the property was divided, and since the divorce his income has not been sufficient to meet the monthly payments, and further payments cannot be made without sacrificing the property awarded to him in the decree. *Worden v. Worden*..... 614

8. DIVORCE—ALIMONY—REVOCATION OF ORDER. Where a decree of divorced awarded alimony to the wife "until the further order of the court," the order, being temporary in its nature, was subject to revocation at the discretion of the court. *Worden v. Worden*..... 614

9. SAME—DECREE—DIVISION OF PROPERTY—DISCRETION. Upon granting a divorce to both parties on the ground of cruelty by each and inability to live together, the court has a wide discretion in the division of community property, which will not be set aside because the property awarded to the defendant was somewhat larger than that awarded to the plaintiff, where defendant was in debt and was required to pay plaintiff $30 per month for the support of herself and children, and attorney's fees. *Schirmer v. Schirmer*..... 1

10. DIVORCE—JUDGMENT — PROPERTY RIGHTS — DIVISION — "PERSONAL PROPERTY." Where an agreement had been made between husband and wife in contemplation of a divorce, that their personal property was to be divided equally between them, a judgment awarding the sum of $500 to the husband was not erroneous as against the wife, where there was $1,248 deposited in bank in the wife's name at the time of separation agreement, most of which she appropriated; since money is "personal property" in so far as community possessions are concerned. *Glenn v. Glenn*..... 215

DIVORCE—CONTINUED.

11. SAME—DECREE — DISPOSITION OF PROPERTY — EVIDENCE — SUFFICIENCY. An award of one-half of defendant's real and personal property, on decreeing a divorce in favor of the wife, should be modified so as to give the wife a money judgment for $10,000, and $25 monthly for the support of a minor child, where it appears that the property was the husband's separate property and consisted only of unproductive lands in Alaska and the state of Washington, worth about $60,000; that a holding corporation had been formed by him, capitalized at $100,000, for the purpose of handling the same, that two-fifths of the stock had been pledged for advances made, that the property was of a speculative value as well as unproductive, could not be divided without loss, and would require careful management to avoid dissipation, and that the best interests of the wife would be subserved by awarding a definite sum in money rather than by an award of one-half of the estate. *Willson v. Willson*..... 240

12. SAME—DECREE—ATTORNEY'S FEES. An award of $1,000 attorney's fees in decreeing a divorce to a wife in a hardly contested action involving some $60,000 worth of property, in which the defendant had interposed a cross-complaint, will be sustained on appeal as reasonable. *Willson v. Willson*..... 240

13. DIVORCE—ALIMONY—APPEAL — SUPERSEDEAS — LIABILITY ON BOND. Upon an appeal by a defendant in a divorce suit from an order adjudging him in contempt of court and directing his imprisonment for failure to pay a decree for weekly alimony, a supersedeas bond conditioned to pay all costs that shall be adjudged against him on the appeal, and to satisfy and perform the judgment or orders appealed from in case they or either of them shall be affirmed, covers only the alimony due at the time the appeal was taken; and on affirmance, the sureties are not liable for alimony accruing pending the appeal. *Surry v. Surry*..... 269

14. DIVORCE—ALIMONY—APPEAL — BONDS — SUPERSEDEAS — ACTION ON. In an action upon a supersedeas bond given on appeal by a defendant in a divorce suit from an order adjudging him in contempt of court for failure to pay an installment of alimony, the liability of the defendant for installments of alimony falling due pending the appeal cannot be determined; as that is to be determined in the divorce suit. *Surry v. Surry*..... 269

DOCKS:

See WHARVES.

DOCUMENTS:

As evidence in criminal prosecutions, see CRIMINAL LAW, 3.
Secondary evidence, see EVIDENCE, 1.

DOUBLE TAXATION:

See TAXATION, 3, 4.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 6, 7.

DUPLICITY:

In information, see INDICTMENT AND INFORMATION, 2.

ELECTIONS:

For issue of bonds, see MUNICIPAL CORPORATIONS, 27.

ELEVATORS:

Operation of passenger elevator as extra-hazardous employment, see MASTER AND SERVANT, 4.

EMBEZZLEMENT:

1. EMBEZZLEMENT — MISAPPROPRIATION BY AGENT — DEFENSES. Upon conviction of an agent of larceny by embezzlement under Rem. & Bal. Code, § 2601, upon evidence of the accused that he was intrusted with money to make a payment upon the purchase of a farm, with the express agreement that he was to have no compensation for his services, and that he paid only part of the money, appropriating the balance to his own use, the accused can claim no defense under Rem. & Bal. Code, § 2602, providing that "it shall not be larceny for any bailee, factor, pledgee, servant, attorney or agent . . . to retain his reasonable collection fee or charges;" the reasonable value of his services being wholly immaterial. *State v. Russell*..... 607

2. SAME—DEFENSES—INSTRUCTIONS. In such a case, an instruction is as favorable to the accused as his own evidence warranted, where the jury were told that it is a sufficient defense that the money was withheld or appropriated openly and avowedly, under a claim of right, proffered in good faith, honestly believing that he was legally entitled to it as his own. *State v. Russell*..... 607

EMERGENCY:

Legislative acts, time of taking effect, see CONSTITUTIONAL LAW, 1.
Validity of, see STATUTES, 5.

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 2-19.

1. EMINENT DOMAIN—BY CITIES—POWER—STATUTES—REPEAL. Cities and towns of any class are expressly authorized to condemn lands for the purpose of supplying a water system, by 3 Rem. & Bal. Code, § 8005, which supersedes Rem. & Bal. Code, § 7768, limiting such power to cities and towns having over 1,500 inhabitants. *Redmond v. Perrigo* 407

2. SAME—BY CITIES—PROCEDURE—FAILURE TO PROVIDE. In the absence of a law specifying the procedure, a town of less than 1,500 in-

EMINENT DOMAIN—CONTINUED.

habitants, granted the right of eminent domain, may follow the procedure provided in the general condemnation act, Rem. & Bal. Code, §§ 921, 936, other cities and towns having been authorized to use such procedure. *Redmond v. Perrigo*..... 407

3. EMINENT DOMAIN — PROPERTY SUBJECT — ALREADY DEVOTED TO A PUBLIC USE—FUTURE NEEDS — EVIDENCE — SUFFICIENCY. An electric power company desiring to construct a hydro-electric power plant on its site cannot condemn a power site further up the river which another similar public service corporation, already extensively operating, had acquired for its future needs with the intention of devoting it to the same public use within a reasonable time, and the development of which it now intends to prosecute with diligence, having the means to do so; especially where it clearly appears that, by reason of the more extensive field to be served and the magnitude of its present business, the full capacity of such site will be required as soon as it can be developed in order to keep pace with the natural expansion of its present public service. *State ex rel. Union Trust & Savings Bank v. Superior Court*..... 20

4. SAME—PRESUMPTIONS. Property acquired by a public service corporation in reasonable anticipation of its future needs, is deemed devoted to a public use until abandonment of intention to so use it. *State ex rel. Union Trust & Savings Bank v. Superior Court*.... 20

5. EMINENT DOMAIN—COMPENSATION—WAIVER—RIPARIAN RIGHTS. In condemnation proceedings, the right of a riparian proprietor to assert title to the thread of a nonnavigable stream and claim compensation therefor, is not waived by his attempt to show that he was a riparian proprietor upon a different theory and failed in his proof. *State ex rel. Davis v. Superior Court*..... 252

6. EMINENT DOMAIN—DAMAGES—ELEMENTS—ACCESS TO PUBLIC HIGHWAY. In condemnation proceedings for a railroad right of way through a farm, which crossed a public highway through the farm at such an acute angle as to deprive the owner of right of access to the public highway for a distance of 300 feet on either side of the point of intersection, the owner is entitled to the damages sustained by reason of this interference with his right of access to the highway. *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Foster* 75

7. SAME—DAMAGES—MEASURE OF DAMAGES. Instructions as a whole to the effect that the measure of damages for the condemnation of farm land by a railroad company is the depreciation in the market value of the remaining portion of the farm, in addition to the value of the portions taken, are not erroneous, although they may have been technically so in some few expressions, standing alone. *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Foster*..... 75

EMINENT DOMAIN—CONTINUED.

8. SAME—PROCEEDINGS—INSTRUCTIONS—MEASURE OF DAMAGES. In a condemnation case, an instruction that the jury may take into consideration the market value of the land taken together with the amount of depreciation, if any, of the land not taken, and may consider and determine the depreciation by reason of the taking of water rights, and the value of the water rights taken, is correct and not open to the objection that it fails to state that the measure of damages is the difference between the value before and after the taking. *Redmond v. Perrigo*..... 407

9. SAME—APPEAL—COSTS. A landowner, unsuccessfully appealing from an award in condemnation, is chargeable with the costs of the appeal. *Redmond v. Perrigo*..... 407

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYER'S LIABILITY ACT:

Liability of carrier for injury to employee required to work over time permitted by act, see MASTER AND SERVANT, 3.

ENTRY:

Of judgment, see JUDGMENT, 5, 6.

EQUALITY:

Of tax, see TAXATION, 1, 2, 5.

EQUITY:

See INJUNCTION; SPECIFIC PERFORMANCE.
Review in equitable actions, see APPEAL AND ERROR, 12, 16.

ESCROWS:

Deed in escrow, see VENDOR AND PURCHASER, 1.

ESTABLISHMENT:

Of highways, see HIGHWAYS, 2, 3.

ESTATES:

Partnership estate, see PARTNERSHIP, 1.
Trusts, see TRUSTS.

ESTOPPEL:

To dispute account rendered, see ACCOUNT STATED, 2.
To question title to real estate held by alien, see ALIENS.
By parol evidence to vary writing, see EVIDENCE, 6.
By judgment, see JUDGMENT, 9-15.
Of city by acts of officers, see MUNICIPAL CORPORATIONS, 9.

EVIDENCE:

See ADVERSE POSSESSION, 1; ASSAULT AND BATTERY, 1; DEPOSITIONS; FALSE PRETENSES.
Exceptions to findings for purpose of review, see APPEAL AND ERROR, 5, 6.
Incorporation in record on appeal, see APPEAL AND ERROR, 11.
Harmless error in rulings on, see APPEAL AND ERROR, 29-31.
Of execution of assignment, see ASSIGNMENTS, 2.
Expert opinions in construction of contract, see CONTRACTS, 2.
Doing business in state by corporation, see CORPORATIONS, 2.
In criminal prosecutions, see CRIMINAL LAW, 1-3.
In action for divorce, see DIVORCE, 1, 3, 11.
Condemnation proceedings, see EMINENT DOMAIN, 3.
Bad faith of guardian *ad litem* in defending action, see GUARDIAN AND WARD.
On insurance policy, see INSURANCE, 6.
Inadequacy of price to avoid partition sale, see JUDICIAL SALES, 3.
For injuries to servant in general, see MASTER AND SERVANT, 7.
For personal injuries, see MUNICIPAL CORPORATIONS, 21, 22.
Maintenance of open burner of mill, see NEGLIGENCE.
Newly discovered ground for new trial, see NEW TRIAL, 2-4.
Existence of partnership relation, see PARTNERSHIP, 1.
In action for services, see PHYSICIANS AND SURGEONS, 1.
Malpractice, see PHYSICIANS AND SURGEONS, 3.
Knowledge of defendant in prosecution for placing female in house of prostitution, see PROSTITUTION, 3.
Value of property, see REPLEVIN.
Rescission of contract by buyer, see SALES, 2.
Failure of consideration for note, see SALES, 6.
Instructions as to preponderance of, see TRIAL, 3.
To show water course, see WATERS AND WATER COURSES, 1.
Testimony of witnesses, see WITNESSES.
Performance of contract, see WORK AND LABOR, 1.

1. EVIDENCE—BEST AND SECONDARY—COPIES OF LETTERS. Properly proved copies of letters are admissible, where the originals were in the possession of the adverse party, and proper foundation had been laid by notice and demand to produce the originals, which the adverse party failed to do; their cogency and weight being for the jury. *Glenn v. Glenn*..... 215

2. EVIDENCE—DEMONSTRATIVE EVIDENCE—ADMISSIBILITY—DISCRETION OF COURT. In an action for installments due on the price of an electric piano, in which there was a counterclaim seeking rescission of the contract on the ground of false and fraudulent representations in its procurement, it was not error to permit the presence of the piano, nor of a new piano action, in the court room for the purpose of illustrating expert evidence as to its condition, showing wear to pedals, keys, hammers, and internal mechanism, where there was

EVIDENCE—CONTINUED.

testimony showing the character and extent of the use of the instrument between the date of purchase and time of trial. *Schroeder v. Hotel Commercial Co.* 685

3. EVIDENCE—PAROL EVIDENCE—FRAUD. In an action to recover the price of an instrument sold under a written contract, to which a counterclaim setting up fraud in the procurement of the contract had been interposed, parol evidence is admissible for the purpose of showing the fraudulent inducement, and it is not open to the objection that it is evidence of verbal representations tending to vary the terms of a written instrument. *Schroeder v. Hotel Commercial Co.* 685

4. EVIDENCE—PAROL—WRITTEN CONTRACT—CONTEMPORANEOUS AGREEMENT. Where a conditional sales contract for a motor vehicle without warranty provided that "this contract contains all of the agreements between the parties," evidence of a parol contemporaneous warranty is inadmissible. *Winton Motor Carriage Co. v. Blomberg* 451

5. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. Parol evidence of experts to explain the terms of a contract is inadmissible when the contract is not ambiguous. *Eighme v. Holcomb* 145

6. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—ESTOPPEL—MUTUALITY. Estoppels to vary a written instrument by parol evidence must be mutual; and not applying to a third person not a party to the contract, they cannot be asserted by him against such party. *Ransom v. Wickstrom & Co.* 419

7. SAME—PAROL EVIDENCE TO VARY WRITING—THIRD PERSONS. Where a principal gave his agent a bill of sale of an automobile for the special purpose of making repairs and effecting a sale on commission, parol evidence is admissible, as against a third person levying on the car as the property of the agent, to show that the bill of sale was given pursuant to the agency contract, and did not divest the principal of his ownership. *Ransom v. Wickstrom & Co.* 419

EXAMINATION:

Of witness, see DEPOSITIONS; WITNESSES.

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 5, 6.

EXCESSIVE ASSESSMENT:

See TAXATION, 8, 9.

EXECUTION:

See HOMESTEAD.

Of assignment, sufficiency of evidence, see ASSIGNMENTS, 2.

EXECUTION—CONTINUED.

1. EXECUTION—INTERESTS AFFECTED. An execution runs only against the real and not the apparent interest of the judgment debtor. *Ransom v. Wickstrom & Co*..... 419

2. SAME—SALE—BONA FIDE PURCHASER. An execution creditor purchasing at his own sale is not a *bona fide* purchaser, within the recording acts. *Ransom v. Wickstrom & Co*..... 419

3. EXECUTION — SALES — ASSIGNMENT OF CERTIFICATE — RECITALS OF DEED. The recital in a sheriff's deed to the effect that it is issued to the grantee as assignee of the holder of the sheriff's certificate of sale is not binding upon persons who are not parties to the deed; and it is not evidence that the sheriff was authorized to execute the deed to the assignee, as against the holder of the certificate. *Prentice v. How* 136

4. SAME — SALES — ASSIGNMENT OF CERTIFICATE — SHERIFF'S DEED—VALIDITY. A sheriff's deed on execution sale reciting that the certificate of sale has been assigned to the grantee, who was the attorney for the holder of the sheriff's certificate of sale, an alien at that time absent from the United States, is insufficient to pass the title to the land sold to the attorney or his heirs, where it appeared that the certificate of sale had not been assigned to, and no consideration had been paid by, the attorney, who had evidently taken that step in an effort to protect his client, and had attempted to execute a 99-year lease to the client, and had paid taxes in the client's name and during his absence for many years, and had left his client's lessees in possession of the property. *Prentice v. How*..... 136

EXECUTORS AND ADMINISTRATORS:

Testimony as to transactions with decedents, see WITNESSES, 2.

EXPERT TESTIMONY:

In construction of contract, see CONTRACTS, 2.

EXPRESS TRUSTS:

See TRUSTS.

EXTRA WORK:

Recovery by contractor for, see MUNICIPAL CORPORATIONS, 7, 10.

FACTORS:

Sales on consignment, construction of contract, see SALES, 1.

FALSE IMPRISONMENT:

Liability of officers for unlawful detention of suspected delinquent, see CONSTITUTIONAL LAW, 7.

Liability of wife for acts of husband amounting to, see HUSBAND AND WIFE.

FALSE IMPRISONMENT—CONTINUED.

1. FALSE IMPRISONMENT—DELINQUENT CHILDREN—PARENT AND CHILD. Detention of delinquent children, in the nature of parental restraint, is not imprisonment under a criminal statute, and no constitutional right is violated thereby. *Weber v. Doust*..... 330

2. FALSE IMPRISONMENT — ARREST WITHOUT PROCESS — DELINQUENT CHILD. An officer detaining a delinquent child without complying with the juvenile delinquency act is not liable for false imprisonment if he acts in good faith, in furtherance of the law and for the welfare of the child; but he acts at his peril if he abuses his authority, and is a trespasser *ab initio* and liable for false imprisonment if he did not act in good faith in furtherance of the law, or if actuated by ulterior purposes. *Weber v. Doust*..... 330

3. FALSE IMPRISONMENT — MALICIOUS PROSECUTION — PARTIES LIABLE. Threats made by a creditor, showing malice or motive harbored against the debtor, would not render him liable for false imprisonment or malicious prosecution, committed by a trustee in bankruptcy, where there was nothing to show that the malice of the creditor controlled or contributed to the act of the trustee. *Prentiss v. Bogart* 481

FALSE PRETENSES:

1. FALSE PRETENSES—DEFENSES—MISTAKE—EVIDENCE—ADMISSIBILITY. In a prosecution for grand larceny by false pretenses in giving a check on a bank where he had no funds, which defendant had claimed was a mistake and had at the time offered to give a check on a bank in which he had a deposit, his bank account book showing a balance in his favor in the latter bank is admissible in evidence for the purpose of showing his claim of good faith in the transaction, and his ability to substitute a good check for the one drawn against no funds. *State v. Moore*..... 263

FEES:

Witness fees as costs, see COSTS.
Of attorney in action for divorce, see DIVORCE, 12.

FERRIES:

Use of wharf by county for ferry approach, see WHARVES.

1. FERRIES—RIGHT TO USE—GRANT. Rem. & Bal. Code, § 5013, providing that a county may "operate and maintain . . . a ferry . . . together with approaches and landings . . . appertaining thereto," for tolls, is an exclusive grant to use shore lands, belonging to the state, for the purpose of a wharf and approaches to the ferry connecting with a public highway laid out along the shore. *Anderson Steamboat Co. v. King County*..... 375

FERRIES—CONTINUED.

2. FERRIES—APPROACHES—PUBLIC HIGHWAYS—PRESUMPTION. The presumption that a street converted into a ferry approach by a wharf, is a public highway, may be rebutted, and is overcome where the wharf was constructed by the public for a ferry approach incidental to a franchise right to maintain the ferry. *Anderson Steamboat Co. v. King County*..... 375

FILING:

Bond on appeal, time for, see APPEAL AND ERROR, 9.
Declaration of homestead, see HOMESTEAD.
Conditional sales contract, see SALES, 8.
Claim against state, see STATES, 1.

FINAL JUDGMENT:

Appealability, see APPEAL AND ERROR, 1.

FINDINGS:

Necessity of exceptions for purpose of review, see APPEAL AND ERROR, 5, 6.
Presumptions in absence of findings in equity case, see APPEAL AND ERROR, 16.
Review of on appeal, see APPEAL AND ERROR, 24-26.
By court in civil actions, see TRIAL, 6.

FIRE INSURANCE:

See INSURANCE, 2-6.

FIRES:

Negligent maintenance of open burner of mill, see NEGLIGENCE.

FOOD:

Act regulating sale of stock food as class legislation, see CONSTITUTIONAL LAW, 2-4.

FOREIGN CORPORATIONS:

See CORPORATIONS, 2, 3.

FORFEITURE:

Of contract for sale of land, see VENDOR AND PURCHASER, 3-5.

FORMER ADJUDICATION:

See JUDGMENT, 9-15.

FORMER JEOPARDY:

Bar to prosecution, see CRIMINAL LAW, 4-6, 10.

FRAUD:

See FALSE PRETENSES.
Parol evidence to show fraud, see EVIDENCE, 3.
False swearing in making proofs of loss, see INSURANCE, 3, 4.

FRAUD—CONTINUED.

1. FRAUD — FRAUDULENT REPRESENTATIONS — CURING ERRONEOUS INSTRUCTIONS. In an action for false representations, an instruction allowing recovery if the plaintiffs relied thereupon "or were expected so to do" in connection with an instruction just preceding it explicitly defining defendants' liability as dependent on representations made to plaintiffs "with intent to deceive them and to induce them to rely thereupon, and that plaintiffs did in fact rely thereon and were damaged;" and other instructions to the effect that fraud will not be presumed, etc., taken as a whole, sufficiently states the law with reference to the necessity of plaintiffs' reliance upon the representations. *Bunck v. McAulay*..... 473

2. FRAUD — FRAUDULENT REPRESENTATIONS — MEASURE OF DAMAGES—INSTRUCTIONS. It is proper to instruct that the measure of damages for misrepresenting the value of property sold is the difference between the purchase price and its value at the time of the sale where it would have been worth the agreed price, if it had been as represented. *Bunck v. McAulay*..... 473

3. FRAUD—MEASURE OF DAMAGES—EVIDENCE. In an action to recover damages for fraudulent representations by the vendor in the sale of a hotel lease and furniture for $18,500, the value of the property sold at the time of sale, as bearing on the measure of damages, was a question for the jury, where there was evidence which tended to show that the furniture, if new, would be worth about $8,500, but was worth much less at the time owing to its condition, that the lease extended for something over a year, and that there was no profit in the business, which was a losing venture at the time the sale was made. *Bunck v. McAulay*..... 473

FUNDS:

Apportionment of state school funds, see SCHOOLS AND SCHOOL DISTRICTS.

GRANTS:

To county to use shore lands for ferry approach, see FERRIES.

GUARDIAN AND WARD:

Exercise of guardianship by state, see INFANTS.

1. GUARDIAN AND WARD—GUARDIAN AD LITEM—DUTIES—NEGLIGENCE—FAILURE TO MAKE DEFENSE. The evidence is insufficient to show negligence or bad faith of a guardian *ad litem* in defending an action for partition, where it appears that, in a second action between the same parties, he assumed and vigorously asserted a defense in line with the decision of the same court between the same parties which, if successful, would have resulted advantageously for his wards; and the fact that the first decision relied on by him was sub-

GUARDIAN AND WARD—CONTINUED.

sequently reversed on appeal, and that he did not appeal from an adverse decision in the second case, does not amount to misconduct or a failure to discharge his duties. *Prince v. Mottman*..... 287

HABEAS CORPUS:

1. HABEAS CORPUS—TO ADMIT TO BAIL—INHERENT POWERS OF COURT. As a writ of habeas corpus is an appropriate remedy in aid of bail, the supreme court has inherent power, sustained by the common law and the bill of rights, to grant a writ of habeas corpus to admit to bail pending appeal from an order to vacate an arrest, upon a disputed right affecting the personal liberty of the petitioner. *State ex rel. Syverson v. Foster*..... 58

HABITUAL CRIMINALS:

See CRIMINAL LAW, 2, 3, 8.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 27-32.
In criminal prosecution, see CRIMINAL LAW, 9.
In form of decree, see DIVORCE, 5.
In entry of judgment as to separable cause of action, see JUDGMENT, 5

HEIRS:

See DESCENT AND DISTRIBUTION.

HIGHWAYS:

Damages for interference with access to, see EMINENT DOMAIN, 6.
Ferry approach as public highway, see FERRIES, 2.

1. HIGHWAYS—EXTENT—WATER BOUNDARIES. Where a highway is laid out along a shore, following the shore line, there is no constructive extension of the street into the water, although it touches the water at intervals. *Anderson Steamboat Co. v. King County*. 375

2. SAME—PRESCRIPTION—PUBLIC. A public highway may be acquired by prescription without the expenditure of public funds in improving the street. *Mason County v. McReavy*..... 9

3. HIGHWAYS—ESTABLISHMENT—PRESCRIPTION. A public highway is acquired by prescription, where, by a plat of abutting uplands, a public street was attempted to be dedicated over adjoining tide lands at that time belonging to the state, and use thereof by the public was continued for more than ten years after the upland owners had acquired title to the tide lands from the state. *Mason County v. McReavy* 9

4. HIGHWAYS—OBSTRUCTION—NUISANCE—WHAT CONSTITUTES. A finding that an obstruction in a street was a public nuisance is sustained, where it appears that defendants, in the nighttime, without

HIGHWAYS—CONTINUED.

obtaining permission, built a structure extending across the street from thirteen to twenty inches above the surface of the street, with inclined approaches on each side. *Mason County v. McReavy*... 9

HOMESTEAD:

1. HOMESTEAD — DECLARATION OF HOMESTEAD — EXECUTION. Under Rem. & Bal. Code, § 529, a declaration of homestead must be filed prior to the date of execution sale of the premises, in order to preserve a homestead right as against an execution purchaser. *State ex rel. Jakubowski v. Superior Court*..... 663

HORTICULTURE:

Horticultural products subject to inspection, see AGRICULTURE.
Validity of horticultural inspection law, see CONSTITUTIONAL LAW, 6.

HOURS FOR WORK:

Violation of Federal employer's liability act, see MASTER AND SERVANT, 3.

HUSBAND AND WIFE:

See DIVORCE.
Placing wife in house of prostitution, see INDICTMENT AND INFORMATION; PROSTITUTION.
Substituted service of process on wife, see PROCESS.
Agreement between as constituting express trust, see TRUSTS.
Competency as witnesses, see WITNESSES, 1.

1. HUSBAND AND WIFE—MISCONDUCT OF HUSBAND—LIABILITY OF WIFE. A wife is not liable for acts of her husband amounting to malicious prosecution and false imprisonment. *Prentiss v. Bogart*..... 481

IMPEACHMENT:

Of architects' certificate of completion of state building, see STATES, 3.

IMPLICATION:

Repeal of statute by, see STATUTES, 2.

IMPRISONMENT:

See FALSE IMPRISONMENT.
Persons entitled to bail, see BAIL.
Habeas corpus, see HABEAS CORPUS.

IMPROVEMENTS:

On premises demised, liability of landlord, see LANDLORD AND TENANT, 3, 4.
Liens, see MECHANICS' LIENS.
Public improvements, see MUNICIPAL CORPORATIONS, 2-19.
By tenant, allowance of payments by as rent against receiver of lessor, see RECEIVERS, 2.

INCUMBRANCES:

Covenants against, see VENDOR AND PURCHASER, 1, 2.

INDEMNITY:

Agreement to save city harmless from loss or damage in performance of contract, see MUNICIPAL CORPORATIONS, 5.

1. INDEMNITY—IMPLIED CONTRACT—JOINT TORT FEASORS. Where a contractor on city work does the work in accordance with the city's defective plans and specifications, protesting that they were unsafe and on the assurance by the city that they were safe, the contractor is not *in pari delicto* with the city, and may recover from it such damages as he has been compelled to pay an injured employee by reason of the dangerous condition of the place arising from making the improvement in accordance with the plans and specifications. *Aberdeen Construction Co. v. Aberdeen*..... 429

2. INDEMNITY—IMPLIED CONTRACT—VOLUNTARY PAYMENT. Where a contractor on city work, legally liable to his employee for damages for personal injuries occasioned by putting the employee in an unsafe place to work, paid the damages in a reasonable amount before judgment rendered, the payment was not such a voluntary one as to preclude recovery over against the city, when the latter was primarily liable for the unsafety of the place provided. *Aberdeen Construction Co. v. Aberdeen*..... 429

INDEPENDENT CONTRACTORS:

See MASTER AND SERVANT, 8.

INDICTMENT AND INFORMATION:

See PROSTITUTION, 4-6; ROBBERY.

Charging accused with being an habitual criminal, see CRIMINAL LAW, 8.

Reversal for insufficiency of, effect of order of dismissal, see CRIMINAL LAW, 10.

1. INDICTMENT AND INFORMATION—REQUISITES—DIRECTNESS AND CERTAINTY—PROSTITUTION. Under Rem. & Bal. Code, § 2440, subd. 4, making it a felony for the husband to "connive at, consent to, or permit" his wife's being or remaining in any house of prostitution or leading a life of prostitution, an information charging the offense only by inference, in that it merely alleged that he solicited certain persons to go to a house of prostitution, and to have sexual intercourse with her with intent that she should lead a life of prostitution, is insufficient, in view of Id., § 2057, requiring the information to be direct and certain as to the crime charged and the circumstances of the crime when necessary to constitute a complete crime. *State v. Dodd*..... 436

2. INDICTMENT AND INFORMATION—REQUISITES—DUPLICITY. An information is bad for duplicity where it charges the defendant with the

INDICTMENT AND INFORMATION—CONTINUED.

three overt acts of (1) placing his wife in the charge of another person for immoral purposes, (2) of soliciting certain individuals to go to a house of prostitution for an immoral purpose, and (3) with conniving at and consenting to his wife's leading a life of prostitution, without attempting to charge that the three acts were connected in any way, and all of which are specified as different offenses under Rem. & Bal. Code, § 2440, subds. 1, 4 and 5; since Id., § 2059, provides that an information must charge but one crime and in one form only, except where the crime may be committed by the use of different means, in which case the means may be alleged in the alternative. *State v. Dodd*..... 436

INFANTS:

Custody and support on divorce of parents, see DIVORCE, 1, 6, 9, 11.
Negligence of guardian *ad litem*, see GUARDIAN AND WARD.

1. INFANTS—GUARDIANSHIP—POWERS OF STATE. The right of the state to exercise guardianship over a child does not depend upon statute. *Weber v. Doust*..... 330

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INHERITANCE:

See DESCENT AND DISTRIBUTION.

INITIATIVE AND REFERENDUM:

Laws subject to, see STATUTES, 5.

INJUNCTION:

Public improvements, see MUNICIPAL CORPORATIONS, 2.

1. INJUNCTION—WHEN LIES—ADEQUATE REMEDY AT LAW—INSURANCE—CANCELLATION OF LICENSE. Where the insurance commissioner is about to unlawfully cancel the license of an insurance agent, private rights are threatened for which there is no adequate remedy other than injunction. *Calvin Phillips & Co. v. Fishback*..... 124

2. INJUNCTION — WHEN ISSUES — REMOTE OR SPECULATIVE INJURY. Since an injunction will not be granted except against a clear case of material injury, and not to prevent purely speculative and theoretical injury, a writ of injunction will not be issued against the state board of land commissioners to prevent a reappraisement and public sale of certain tide lands (appropriated to a special fund the indebtedness against which was not a charge against the state) on the ground that warrants issued against the fund might become valueless or depreciated in case of any change in the appraised value of the lands, where it appears that the injury is remote or speculative. *Bouckaert v. State Board of Land Commissioners*.. 356

INSPECTION:

Of horticultural products, see AGRICULTURE.

INSTRUCTIONS:

Review of errors upon in equitable action, see APPEAL AND ERROR, 12.
Presumption of prejudice from, see APPEAL AND ERROR, 17.
Harmless error in giving or refusing, see APPEAL AND ERROR, 31, 32.
In criminal prosecutions, see CRIMINAL LAW, 7, 9.
In civil actions, see TRIAL, 2, 3.

INSURANCE:

Enjoining cancellation of agent's license, see INJUNCTION, 1.

1. INSURANCE—REGULATION—REBATES—STATUTES — CONSTRUCTION. 3 Rem. & Bal. Code, § 6059-33, an act intended to maintain an absolute standard of insurance rates, with the severe penalty of cancellation of an agent's license for violation thereof, will not be extended by judicial construction beyond its evident purpose. *Calvin Phillips & Co. v. Fishback*..... 124

2. INSURANCE—REBATES—CONTRACT — CONSTRUCTION. An agreement in an application for a loan made to a loan company (also a licensed insurance agent) providing that "I hereby agree . . . in consideration of the services rendered . . . to compensate them, if said loan is secured, by granting them the exclusive right as insurance agents to write, or have written, all the fire insurance carried on the buildings," is not an agreement for unlawful insurance rebates, in violation of 3 Rem. & Bal. Code, § 6059-33, prohibiting licensed agents from "offering, promising, allowing, giving, or paying, directly or indirectly, any rebate of the premium payable on the policy . . . or any other valuable consideration or inducement to or for insurance . . . which is not specified in the policy contract of insurance." *Calvin Phillips & Co. v. Fishback*..... 124

3. INSURANCE—FIRE INSURANCE—WAIVER OF DEFENSES—ACTS OF ADJUSTERS—AUTHORITY—STATUTORY PROVISIONS. In the absence of proof of special authority, an adjuster's investigation after proofs of loss are made, and his demand for duplicate invoices from the insured, do not constitute a waiver of objections or estop the company from defending an action on a fire insurance policy for false swearing in the proofs of loss, in view of 3 Rem. & Bal. Code, § 6059-2, defining an "adjuster" as one who undertakes to ascertain and report the actual loss due to the hazard or peril insured against; since the statute having defined the duties of an adjuster, there could be no presumption of other authority from the fact that he was acting as adjuster. *Manheim v. Standard Fire Insurance Co.* 16

4. INSURANCE—FIRE INSURANCE—POLICY—PROVISIONS — WAIVER. Under a policy of fire insurance providing that the company shall not be held to have waived any provision in the policy by any act re-

INSURANCE—CONTINUED.

lating to the appraisal or examination provided for, the defense of false swearing in making the proofs of loss is not waived by an adjuster's investigation after proofs of loss are made or by his demand for duplicate invoices; since the policy contemplates a full and complete investigation as to the property destroyed and its value. *Manheim v. Standard Fire Insurance Co*..... 16

5. INSURANCE — ACTIONS FOR PREMIUMS — PARTIES — AGENTS — REAL PARTY IN INTEREST. An insurance agent who extends credit for insurance written by him, and is held responsible therefor by the company, is subrogated to all the rights of the company in the premiums, and may sue therefor without assignments thereof. *Lamb v. Connor* 121

6. INSURANCE — ACTIONS FOR PREMIUMS — EVIDENCE — ADMISSIBILITY. In an action to recover insurance premiums, written to secure a contractor engaged in repairing the building, evidence that the contractor had filed a lien on the building and foreclosed it, is competent to show his contractual relations and mutual interests in the property insured. *Lamb v. Connor*..... 121

INTEREST:

Municipal bonds, see MUNICIPAL CORPORATIONS, 27.

INTERROGATORIES:

To witnesses, see DEPOSITIONS.

INTESTACY:

See DESCENT AND DISTRIBUTION.

ISSUANCE:

Of bonds for purchase of water system, see MUNICIPAL CORPORATIONS, 25-27.

JEOPARDY:

Former jeopardy, see CRIMINAL LAW, 4-6, 10.

JOINDER:

Of offenses in indictment, see INDICTMENT AND INFORMATION, 2.

JOINT TORT FEASORS:

See INDEMNITY.

JUDGES:

Comments on evidence, see TRIAL, 2.

JUDGMENT:

Review, see APPEAL AND ERROR.

Parties entitled to appeal from order of vacation, see APPEAL AND ERROR, 1.

JUDGMENT—CONTINUED.

Reformation on appeal in interest of certainty, see APPEAL AND ERROR, 33.

In divorce, see DIVORCE, 5-13.

Establishing labor liens, see MASTER AND SERVANT, 1.

Prohibition to prevent enforcement of judgment pending appeal, see PROHIBITION, 2.

1. JUDGMENTS—BY DEFAULT—VACATION. A default judgment cannot be vacated on petition, unless facts are alleged constituting a good defense to the action, as required by Rem. & Bal. Code, § 467. *State ex rel. Pacific Loan & Investment Co. v. Superior Court*... 392

2. JUDGMENT—NOTWITHSTANDING VERDICT—TIME FOR MOTION. A party is not precluded from seasonably interposing a motion for a judgment notwithstanding the verdict by suffering the case to go to the jury on the facts without interposing a motion for nonsuit, for directed verdict, or a challenge to the sufficiency of the evidence. *Kieburtz v. Seattle*..... 196

3. JUDGMENT—PARTIES—ASSIGNEE FOR COLLECTION — PERSONAL JUDGMENT. The entering of judgment, on rescission of a contract, against an assignee for collection is not error, where the only personal judgment entered against him was for the costs of the action. *Schroeder v. Hotel Commercial Co*..... 685

4. JUDGMENT—PERSONS NOT PARTIES—REAL PARTY IN INTEREST. A judgment against one not named as a party to the action is not erroneous, where the court finds that the plaintiff was an assignee merely for collection; that the party against whom judgment was rendered was the real party in interest; that it was represented in the action by its agents who were paid by it; and that it actually participated in the trial, though not a nominal party; since one not a technical party is bound by the decree if he be interested in the subject-matter of litigation and has exercised the right to participate. *Schroeder v. Hotel Commercial Co*..... 685

5. JUDGMENT—DISTINCT JUDGMENTS IN SAME CASE—SEPARABLE SUBJECT-MATTER — APPEAL AND ERROR — HARMLESS ERROR. Where there are separable causes of action set up in an action, the entry of judgment by consent as to one cause and continuance as to the other is not prejudicial error, and nothing more than an irregularity when the court has jurisdiction of parties and subject-matter. *Winton Motor Carriage Co. v. Blomberg*..... 451

6. JUDGMENT—CONSENT TO ENTRY—VALIDITY—WAIVER OF PROOF—REVIEW. Judgments by consent are valid as between the parties, dispensing with the necessity of proof of the complaint, and, in the absence of fraud or mistake, are not reviewable on appeal. *Winton Motor Carriage Co. v. Blomberg*..... 451

7. JUDGMENTS—VACATION—LIMITATIONS. Proceedings to vacate a judgment by motion or by petition, under Rem. & Bal. Code, §§ 303,

JUDGMENT—CONTINUED.

464-466, are limited to one year after entry of the judgment, unless the judgment is void on its face for want of jurisdiction. *State ex rel. Pacific Loan & Investment Co. v. Superior Court*..... 392

8. SAME—VACATION—JURISDICTION—DEFECT IN SERVICE. A judgment is not void on its face, so that it may be attacked at any time, where the alleged defect in service of process does not appear in the record, and a showing outside the record is necessary. *State ex rel. Pacific Loan & Investment Co. v. Superior Court*..... 392

9. JUDGMENTS—RES JUDICATA—MATTERS AND PARTIES CONCLUDED. A judgment in mandamus, at the suit of a contractor against a city, compelling the city to levy an assessment to pay the cost of a local improvement, is not *res judicata*, upon an appeal by a particular property owner, upon the question of the amount of benefits, if any, legally assessable against his property, he not being a party to the former action and the question of benefits not being there involved; the former decision being merely that property owners were liable for assessment to the extent of the benefits received by them. *In re Assessment for Local Improvement Sewer District No. 1 of Chehalis* 565

10. JUDGMENT—CONCLUSIVENESS—PARTIES CONCLUDED. The fact that the plaintiff in the second suit did not file an answer or cross-complaint in the former action would not change the force and effect of a judgment of dismissal with prejudice therein, where it appears from the record that he was informed of the allegations of the complaint and consented to the rendering of a judgment with prejudice upon the issues tendered. *Morgan v. Hart*..... 496

11. JUDGMENT—RES JUDICATA—QUESTIONS CONCLUDED. An action for the recovery of damages resulting from the breach of a contract relating to the financing and control of a corporation is barred by the judgment of dismissal "with prejudice" in a former action involving the same parties and subject-matter, wherein it was sought to compel an accounting for moneys advanced by some of the parties for the purpose of acquiring an interest in the corporation. *Morgan v. Hart* 496

12. SAME. The fact that plaintiff in the second suit was joined as a defendant in the first suit, along with his present adversary, for the reason that he refused to join as plaintiff, would not affect the efficacy of judgment in the prior equitable suit as *res judicata*, since his rights adverse to the present defendants could have been as fully adjusted therein in his capacity as defendant as if he had been one of the plaintiffs. *Morgan v. Hart*..... 496

13. SAME. The fact that plaintiff has introduced in his complaint the element of fraud of the principal defendant in bringing about a settlement following the prior suit, is not the injection of a new

JUDGMENT—CONTINUED.

issue, but merely the anticipation of a defense which might be made against the claims of plaintiff, and hence cannot be considered as affecting the *res adjudicata* of the judgment in the former suit involving the violation by the principal defendants of the original contract between all the parties. *Morgan v. Hart*..... 496

14. JUDGMENT—DISPOSITION OF CASE. A judgment of dismissal with prejudice is sufficiently certain to form a bar to a subsequent action involving the same parties and issues, as it in effect determined that the defendant was not accountable to the adverse parties therein. *Morgan v. Hart*..... 496

15. JUDGMENT—RES JUDICATA—REPLEVIN. In an action to replevin two motor cars, where the parties stipulate in open court that judgment may be entered for the possession of one car and the cause continued as to the other car, and no appeal is taken from the judgment by consent or from an order refusing to vacate same, the judgment is *res judicata* as to all matters relating to the car involved in the consent judgment. *Winton Motor Carriage Co. v. Blomberg*.... 451

JUDICIAL SALES:

On execution, see EXECUTION.

1. JUDICIAL SALES—IRREGULARITIES—NOTICE—CONFIRMATION—EFFECT. After confirmation of a partition sale, the referee's report and order of confirmation showing a substantial compliance with the statute as to notice, objection cannot be made to the notice of sale in that the name of the newspaper and the day of the week on which the paper was published was not shown by the report, nor that the last day of publication was given as November 14th, when from the context of the report it appears that the same was a clerical error, intended for December 14th. *Prince v. Mottman*..... 287

2. JUDICIAL SALES—VACATION—RIGHTS OF PURCHASERS—BONA FIDES. Under Rem. & Bal. Code, § 1742, providing that property acquired by a purchaser in good faith under a judgment subsequently reversed shall not be affected by such reversal, a partition sale to purchasers not parties to the action, who bought on the open market, will not be vacated because of irregularities or errors which resulted in the judgment, at the suit of minors who were parties to the action and represented by a guardian *ad litem*, who failed to appeal from or supersede the judgment. *Prince v. Mottman*..... 287

3. JUDICIAL SALES — VACATION — INADEQUACY OF PRICE—EVIDENCE—SUFFICIENCY. Such inadequacy of price as to avoid a partition sale is not shown where it appears that, four years previous to the sale, the land had been appraised at $6,245, that it sold for $8,100 after a prior sale had been set aside, that the purchaser offered to surrender the property for the price bid, with reasonable interest, although witnesses testified that the property was worth $18,000 two years after the sale, there being no evidence of the value at the time of the sale. *Prince v. Mottman*..... 287

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR, 1.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 7, 9.
Assessment of damages in condemnation proceedings, see EMINENT DOMAIN, 8.
Misconduct ground for new trial, see NEW TRIAL, 1.
Instructions in civil actions, see TRIAL, 2, 3.
Questions for jury in civil actions, see TRIAL, 4.
Verdict in civil actions, see TRIAL, 5.

KNOWLEDGE:

Of fires set by open burner of mill, see NEGLIGENCE, 2.

LACHES:

As creating estoppel to claim title as against purchaser from consignee, see SALES, 5.

LANDLORD AND TENANT:

Liability of lessee of coal mine for labor liens, see MASTER AND SERVANT, 2.
Allowance as rent against receiver of payments by tenant for improvements, see RECEIVERS, 2.

1. LANDLORD AND TENANT—LEASE—CERTAINTY—TERM TO BE AGREED UPON—"YEARLY RENTAL"—SPECIFIC PERFORMANCE. A contract of lease providing for a renewal at a "yearly rental" at a rent to be agreed upon or fixed by arbitration, for a term to be agreed upon, is not so uncertain as to warrant refusal of specific performance; since a term at a "yearly rental" was for at least two years; and the court could fix a reasonable term under all circumstances, if either party captiously refused to do so; especially in view of partial performance, and valuable consideration to the lessor in regard to the use of the land for factory purposes, and agreements by the lessee to restore the land to its original condition upon abandonment or termination of the lease, with the right to remove all improvements. *Faucett v. Northern Clay Co*..... 382

2. LANDLORD AND TENANT—COVENANTS—CONSENT TO LEASE—RIGHTS OF MORTGAGEES. Mortgagees and lienors, expressly assenting to a lease, are bound by the conditions thereof requiring the lessor to make repairs necessary to put the premises in fit condition for use. *Thomson Estate v. Washington Investment Co*..... 326

3. SAME—RENT—RECOUPMENT FOR REPAIRS—RIGHT OF ACTION—EFFECT OF PAYING RENT. Payment of rent does not waive a tenant's right of recovery for necessary improvements, agreed to be made by the lessor, inasmuch as the general statutes relating to counterclaims apply to actions for the recovery of rent, and a tenant, pay-

LANDLORD AND TENANT—CONTINUED.

ing for repairs which the lessor had agreed to make to put the premises in fit condition for use, may elect to recoup his damages or bring a separate action therefor. *Thomson Estate v. Washington Investment Co.* 326

4. LANDLORD AND TENANT—ALTERATIONS—LIABILITY OF TENANT. Liability for the construction of a fire escape in case of use of premises for assembly purposes, as required by city regulations, falls upon the tenant and not the landlord, where, by the terms of the lease, the premises were let for the special purpose of lodge and club rooms and offices, the lessee was given the premises rent free for at least one and possibly three weeks in order to make, without expense to the landlord, the necessary alterations for which a city permit was granted upon application of the lessee immediately after the lease was executed; and, while the lessor's consent was necessary, it was further provided that he should not be liable for alterations contracted for by the lessee; since the lessee was chargeable with knowledge of the police regulations governing the use of the building, and accepted the premises in their existing condition unfitted for the purpose for which they were leased. *Lodge Room Co. v. Pacific Bond & Investment Co.* 150

LANDS:

See PUBLIC LANDS.

LARCENY:

See CRIMINAL LAW, 1; EMBEZZLEMENT; FALSE PRETENSES.
Probable cause for prosecution, see MALICIOUS PROSECUTION.

LAST CLEAR CHANCE:

To avoid accident, see MUNICIPAL CORPORATIONS, 20.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

Infringement by courts, see CONSTITUTIONAL LAW, 1.
Delegation of, see CONSTITUTIONAL LAW, 6.

LETTERS:

Copies of as evidence, see EVIDENCE, 1.

LIBEL AND SLANDER:

1. LIBEL AND SLANDER—WORDS ACTIONABLE PER SE—BASTARD. Orally charging that plaintiff is a bastard is not actionable *per se*. *Paysse v. Paysse* 351

2. LIBEL AND SLANDER—INSTRUCTIONS—CONTRADICTORY INSTRUCTIONS. In an action for slander in orally charging that plaintiff was a

LIBEL AND SLANDER—CONTINUED.

bastard, it is reversible error to give instructions that are contradictory, telling the jury that, in the one charge, the words were libelous *per se*, and in a similar charge, that they were not so. *Paysse v. Paysse*..... 351

3. SAME—INSTRUCTIONS—ISSUES AND PROOF. In an action for slander in orally charging that plaintiff was a bastard, it is reversible error to instruct the jury that there could be a recovery if the plaintiff was especially damaged, when there was no allegation or proof of special damages. *Paysse v. Paysee*..... 351

LICENSES:

Enjoining cancellation of insurance agent's license, see INJUNCTION, 1.

LIENS:

See MECHANICS' LIENS.

Priority of labor liens over chattel mortgage, see CHATTEL MORTGAGES.

For labor, see MASTER AND SERVANT, 1, 2.

For public improvements, see MUNICIPAL CORPORATIONS, 15-17.

LIMITATION:

On cost of improvement, see MUNICIPAL CORPORATIONS, 14.

On public debt, see MUNICIPAL CORPORATIONS, 23, 24.

LIMITATION OF ACTIONS:

Time for taking appeal, see APPEAL AND ERROR, 8.

Vacation of judgment, see JUDGMENT, 7.

LIMITATION OF LIABILITY:

Of carrier, see CARRIERS.

LIVE STOCK:

Carriage of, see CARRIERS.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 6.

MALICIOUS PROSECUTION:

See FALSE IMPRISONMENT, 3.

Liability of wife for acts of husband amounting to, see HUSBAND AND WIFE.

1. MALICIOUS PROSECUTION—PARTIES LIABLE—PROBABLE CAUSE. Under Rem. & Bal. Code, § 2601, defining larceny as the taking of property with intent to deprive or defraud the owner thereof, and Rem. & Bal. Code, § 2303, defining an owner as any person who has a gen-

MALICIOUS PROSECUTION—CONTINUED.

eral or special property, in the whole or any part thereof, or the lawful possession thereof, either actual or constructive, a trustee in bankruptcy, in possession of property claimed and later decided to be exempt, is entitled to maintain his possession until the referee's finding is reversed; and hence has probable cause for instituting a prosecution for larceny thereof against the owner who took the same in an unlawful way. *Prentiss v. Bogart*..... 481

2. SAME—WANT OF PROBABLE CAUSE—REMEDY BY CIVIL ACTION. The fact that a person resorts to the criminal courts for the theft of an article, when he might have had recourse to a civil action for its recovery, cannot be urged by the accused as want of probable cause for the prosecution. *Prentiss v. Bogart*..... 481

MALPRACTICE:

See PHYSICIANS AND SURGEONS, 2, 3.

MANDAMUS:

1. MANDAMUS—NATURE—PURPOSES. Since mandamus is a discretionary writ, it must be sought with clean hands, and will not issue to accomplish an illegal purpose, viz.: to obtain an apportionment of school funds on account of five days' attendance of school held during the prescribed vacation period, in violation of Rem. & Bal. Code, § 4509. *State ex rel. School District No. 301 v. Preston*..... 79

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Right of contractor to recover over from city for damages paid injured employee, see INDEMNITY.

Liens for labor and materials, see MECHANICS' LIENS.

Action for services, see WORK AND LABOR.

1. MASTER AND SERVANT—LIENS FOR LABOR—PROPERTY SUBJECT—REAL OR PERSONAL PROPERTY—DECREE. Motors, pumps, railroad rails, coal cars, a mule, and a blacksmith's outfit, used in operating a coal mine, are to be classed as personal property in a decree establishing labor liens; while bunkers and all necessary wiring are to be classed as real property; but "other equipment about the mine" is too general a designation to be sufficient in an involuntary lien, without other specific designation in the decree establishing the lien, where it was found that only the personal property was subject to the lien. *Cook v. Washington-Oregon Corporation*..... 68

2. MASTER AND SERVANT—LIENS FOR LABOR—ON OPERATING PROPERTY IN POSSESSION OF LESSEE—INTERESTS SUBJECT. Under Rem. & Bal. Code, § 1149, giving a lien to any person performing labor for any person or corporation operating specified property (including mines),

MASTER AND SERVANT—CONTINUED.

upon all the real and personal operating property thereof, the lien is confined to the interests of a lessee of a mine, in possession and holding also under a conditional sales contract, where the lessee employed the lien claimants, none of whom performed labor for the owner and lessor. *Cook v. Washington-Oregon Corporation*.... 68

3. MASTER AND SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT—VIOLATION—HOURS FOR WORK. The violation of the Federal employer's liability act in requiring an employee to work over the time permitted by the act, does not render an interstate carrier liable for an accident to an employee, unless it be alleged and proved that the violation of the act was the proximate cause of the accident. *Bjornsen v. Northern Pac. R. Co*..... 220

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"EXTRA-HAZARDOUS" EMPLOYMENTS — STATUTES—CONSTRUCTION. The operation of a passenger or freight elevator is not an extra-hazardous employment entitling the operator to compensation for injuries within the definition of the workmen's compensation act, 3 Rem. & Bal. Code, §§ 6604-2, 6604-3, which includes "factories, mills . . . breweries, elevators, wharves, docks . . ." etc., since the context and setting of the words indicates a legislative intent to cover classes of business rather than particular pieces of machinery, and the use of the words "passenger and freight elevators" in § 6604-4, under the classification of "construction work," shows that the statute means those engaged in the manufacture or construction of freight and passenger elevators; especially in view of the fact that the schedule of rates to be paid does not specifically cover passenger or freight elevators, but does include the operation of grain elevators. *Guerrieri v. Industrial Insurance Commission*..... 266

5. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—CIVIL ACTION. A person whose usual or regular employment, that of a truck driver and storekeeper's helper, was not extra-hazardous, but whose duty it was when called upon, to assist and work under the direction of an electrician in the installation of electric motors, classed as an extra-hazardous employment in the workmen's compensation act (3 Rem. & Bal. Code, § 6604-4), is subject to the provisions of that act, while engaged in such extra-hazardous work; and hence cannot maintain an action for personal injuries, against his employer who had fully complied with the act, in view of Id., § 6604-1, withdrawing all phases of the subject from private controversy, and abolishing all civil causes of action for personal injuries sustained in extra-hazardous employment, where the employer had complied with the act. *Replogle v. Seattle School District No. 1* 581

6. SAME—SAFE APPLIANCE AND METHODS—COMMON USE. Negligence cannot be imputed from the use of coal cars with trapdoors liable

MASTER AND SERVANT—CONTINUED.

to become swollen and difficult to open, when they are the class of cars commonly used by railway companies for such purposes, the doors of which commonly become swollen; since an employer is entitled to make use of the appliances common to the prosecution of his business, and is liable for injury resulting therefrom only in case the appliances and methods used are inherently dangerous and the dangers are concealed from the employees. *Bjornsen v. Northern Pac. R. Co.*..... 220

7. MASTER AND SERVANT — INJURY TO SERVANT — NEGLIGENCE — SAFE PLACE TO WORK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. No action lies for the death of an employee of two years' experience in unloading coal cars at the company's bunkers, caused by his fall into the bunkers, where it appears that the cars, of usual trapdoor construction, were driven above the bunkers, and it was necessary, by reason of the swollen condition of the trapdoors as a result of dampness, to force the doors with a crowbar, that he had been warned against the danger of standing on the coal while forcing the doors, and while working in this manner at one of the doors, it suddenly opened and carried the employee with the mass of coal into the bunkers. *Bjornsen v. Northern Pac. R. Co.*..... 220

8. MASTER AND SERVANT — RELATION — INDEPENDENT CONTRACTORS — COUNTIES—LIABILITY TO THIRD PERSONS—COMPLAINT. Under the rule that the principal is liable for the acts of an independent contractor, when the character of the work is inherently and intrinsically dangerous, a complaint by a railway company against a county states a cause of action when it alleges that the county let a contract for the construction of a state road knowing that it was inherently dangerous and would result in damaging plaintiff's right of way, tracks and telegraph wires adjacent thereto, and in endangering the operation of the trains; that the contractor, under plans and specifications given by the county, used explosives for the purpose of removing stones and stumps, throwing stones, stumps, etc., across the right of way, railway tracks and telegraph wires; and that he felled trees in such a negligent manner as to allow them to fall onto and across the right of way, railway tracks and telegraph wires of plaintiff; the methods employed being contemplated, and sanctioned, and acquiesced in by the county, which at all times had knowledge of the methods whereby the contract was being completed, and at all times during the construction of said highway controlled the manner of doing the work. *Northern Pac. R. Co. v. Tillotson*..... 678

MATERIALMEN:

Action on bond to secure performance of state contract, see STATES, 1.

MATURITY:

Of municipal bonds, see MUNICIPAL CORPORATIONS, 26.

MEASURE OF DAMAGES:

For condemnation of property for public use, see EMINENT DOMAIN, 7, 8.

For false representations as to value of property sold, see FRAUD, 2, 3.

MECHANICS' LIENS:

Amendment of decree of foreclosure in interest of certainty, see APPEAL AND ERROR, 33.

Priority of, see CHATTEL MORTGAGES.

Liens for labor, see MASTER AND SERVANT, 1, 2.

1. MECHANICS' LIENS—OPERATION—PRIORITY BY RELATION. A temporary cessation of work, where the design of the performance is not abandoned and work is subsequently resumed and prosecuted without any substantial change in the plan, will not prevent relation back of a mechanics' lien to the time of the original commencement of work, in view of Rem. & Bal. Code, § 1147, which declares that the provisions of the mechanics' lien law shall be liberally construed with a view to effect their objects. *Bradley v. Donovan-Pattison Realty Co.* 654

MEDICAL BOARD:

Power of state medical examiners to employ private counsel, see STATES, 4, 5.

METHOD:

Assessment of property for taxation, see TAXATION, 7.

METHOD OF WORK:

Unsafe method of work, see MASTER AND SERVANT, 6.

MILEAGE:

Of witnesses as costs, see COSTS.

MINES AND MINERALS:

Liens for labor in coal mine, see MASTER AND SERVANT, 1, 2.

MISREPRESENTATION:

See FRAUD.

Inducing sale, see SALES, 2.

MISTAKE:

Possession under mistake as to title, see ADVERSE POSSESSION, 1.

As defense to prosecution for grand larceny, see FALSE PRETENSES.

MODIFICATION:

Of decree in divorce, see DIVORCE, 7.

MONEY RECEIVED:

Liability of broker for refund of money to purchaser, see BROKERS.

MONOPOLIES:

Grants of privileges or immunities, see CONSTITUTIONAL LAW, 2-5.

MORTGAGES:

Personal property, see CHATTEL MORTGAGES.

Liability of mortgagees upon consent to lease, see LANDLORD AND TENANT, 2.

Priorities between mortgages and mechanics' liens, see MECHANICS' LIENS.

Prohibition to prevent vacation of foreclosure decree, see PROHIBITION, 1.

MOTIONS:

For judgment *non obstante*, see JUDGMENT, 2.

MUNICIPAL CORPORATIONS:

Amendment of claim against as harmless error, see APPEAL AND ERROR, 28.

Condemnation for water system, see EMINENT DOMAIN, 1, 2, 8, 9.

Liability of city to contractor for damages paid injured employee, see INDEMNITY.

1. MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL OF AMENDING ORDINANCE. An ordinance which expressly re-enacts in amended form a section of an original ordinance which had been amended, and then repeals the former amendatory ordinance, does not thereby repeal the original section with the elimination of the amendatory ordinance. *Schooley v. Chehalis* 667

2. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — INJUNCTION — REMEDY AT LAW. The granting of a permanent injunction at the suit of a property owner against the letting of a contract for a public improvement was not warranted, where the property owner had an adequate remedy under the statutes (3 Rem. & Bal. Code, §§ 7892-21, 7892-22), giving a right to file an objection to the assessment roll, and, in the event of its overruling by the city authorities, granting the right of appeal to the superior and supreme courts. *Reynolds v. Cosmopolis* 660

3. MUNICIPAL CORPORATIONS—IMPROVEMENTS — CONTRACTOR'S BONDS—NOTICE OF CLAIM—SUFFICIENCY. A notice of claim against a city contractor's bond, for supplies furnished to the contractor, which mentions three improvement districts in which the contractor gave separate bonds to secure the performance of distinct contracts, pursuant to Rem. & Bal. Code, §§ 1159-1161, is so vague and indefinite as to be insufficient to support a cause of action where it fails to segregate the value of the supplies furnished on account of any dis-

MUNICIPAL CORPORATIONS—CONTINUED.

trict, and does not specify the bond against which the claim is filed. *Carstens Packing Co. v. Empire State Surety Co.*..... 545

4. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACTS — WARRANTY OF PLANS. Warranty of the plans and specifications under which a contractor does city street grading cannot be imputed to him in the absence of any stipulation in the contract to that effect, and the city alone can be held liable as warranting the sufficiency of the plans and specifications. *Aberdeen Construction Co. v. Aberdeen* 429

5. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACTS — PROTECTION FROM LIABILITY. A stipulation in a contract for public work that the contractor "agrees to save the city free and harmless from any and all loss, damage or liability caused by any neglect or want of care, or any act or omission done or suffered to be done by the said contractor, its agents, servants, employees or subcontractors in the performance of said contract," has reference only to damages occurring from the negligence of the contractor and cannot be held to protect the city from injuries caused by its own negligence or carelessness. *Aberdeen Construction Co. v. Aberdeen*..... 429

6. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CHANGES—COMPENSATION. Although changes in the plans of a public contract work may belong to the inconsequential class, the contractors thereon are entitled to remuneration for expenditure incurred with a view to the performance of the omitted work, prior to notification by the city of its proposed abandonment. *Kieburtz v. Seattle*..... 196

7. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CHANGES—ACTIONS—INSTRUCTIONS. The refusal of a requested instruction to the effect that the city engineer did not have the right under the contract to arbitrarily refuse to allow for extra work caused by changes in the plan of the work, where such changes caused a loss to the contractor, was not error, where, by instructions given, the jury were charged that, if they found that a material change had been made in the character of the work, not contemplated by the contract, and such change had materially increased the cost of the work to the contractor to his damage, the contractor was not limited to the contract price, but could recover the increased cost of the work. *Kieburtz v. Seattle*..... 196

8. SAME—IMPROVEMENTS—CONTRACTS—CHANGES. A clause in a contract for public work providing that "the city engineer or board of public works shall have the right to diminish, increase or eliminate any of the items" therein, without such action constituting "a claim for loss of anticipated profits," does not permit radical changes in the contract such as will materially reduce the profits; as entirely eliminating sidewalks around a reservoir which the contractor had

MUNICIPAL CORPORATIONS—CONTINUED.

sublet at a profit of $3,179, but is restricted to minor changes incidental to completion of the work, or necessary to overcome engineering difficulties. *Kieburtz v. Seattle* 196

9. SAME—CONTRACTS—INTERPRETATION BY OFFICERS—ESTOPPEL. The fact that employees in the city engineer's office agreed with the contractor as to the interpretation of the specifications for public work on a reservoir, prior to bidding by the contractor, would not estop the city from asserting that the setting back of stakes then in place as marking the slope of the reservoir was not a material change, where the call for bids named the city engineer as the person authorized to elucidate the plans, and it was not shown that the employees consulted had authority to bind the city. *Kieburtz v. Seattle* 196

10. MUNICIPAL CORPORATIONS — IMPROVEMENTS — CONTRACTS — EXTRA COMPENSATION—ATERATIONS IN PLANS. Where the contract price of a public improvement is based on a unit system, a right of recovery cannot be grounded upon a loss caused by a change in the plans of the work increasing the number of units of one class and decreasing the number in another, especially where the city is empowered by the contract to make "variations in the quantity of work to be done." *Kieburtz v. Seattle* 196

11. SAME. A contractor engaged in the construction of a public reservoir cannot recover for loss occasioned by a change in the amount of excavation and the necessary removal of excavated material from what he understood as necessary through an inspection of the conditions existing at the time he bid thereon, where the specifications expressly provided that the slopes of the reservoir basins were to be excavated to such depth as would reduce them to plane surfaces and this depth was to be determined by the city engineer during the progress of the work; that the excavated material was to be removed from the basins and deposited at such points as the city engineer might direct; that such excavation should be paid for at the rate bid per cubic yard, which price should include the cost of making all excavations, loading, hauling and dumping the material, and should also include trimming the slopes and bottoms and everything necessary to secure the finished result; and that the grades and lines would be given by the engineer in charge on hubs driven in the bottom and slopes of the reservoir basins. *Kieburtz v. Seattle* 196

12. SAME. In such a case, the contractor had no right to assume that the hubs set at the time of the bid marked the true surface of the slopes, or the gullies in the slopes were to be refilled, instead of excavating the slopes to the depth of the gullies, where the contract as to refilling referred only to refilling spaces caused by the excavation of "unsuitable materials" found in the reservoir basins. *Kieburtz v. Seattle* 196

MUNICIPAL CORPORATIONS—CONTINUED.

13. SAME—PERFORMANCE — DEFECTIVE MATERIAL. A contractor on a public work is not entitled to recover for rivet iron, admittedly not of the quality required by the contract and condemned for that reason, where it does not appear that the city engineer selected the rivets, as claimed, but that they were purchased by the contractors on their own responsibility. *Kieburtz v. Seattle*..... 196

14. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—LIMITATION. The statutory provision that the estimated cost of a proposed improvement initiated by resolution shall not exceed fifty per cent of the valuation of the real estate exclusive of improvements thereon, being limited to cities of the first class (3 Rem. & Bal. Code, § 7892-12), is of no avail as to cities other than the first class. *Reynolds v. Cosmopolis*..... 660

15. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS — ASSESSMENTS — TAXATION—LIEN—PRIORITY. A local assessment to pay for lands condemned for a municipal improvement is levied in the exercise of the sovereign power of taxation, and may be made superior to all other liens regardless of time. *Carstens & Earles v. Seattle*. 88

16. SAME—ASSESSMENTS—LIENS—PRIORITY—STATUTES. Rem. & Bal. Code, §§ 7787-7813, providing for local assessments to pay for the cost of condemnation proceedings for municipal improvements, upon published notice, and to be enforced by summary sale of the property, makes the lien for local assessments superior to prior mortgage or contract liens on the property, although the law contains no express terms so providing; the intent being to subject the property to the lien by a proceeding *in rem*, regardless of its ownership and of all prior contract liens. *Carstens & Earles v. Seattle*... 88

17. SAME. Such rule is not affected by the fact that the general revenue laws and other local assessment statutes *in pari materia* provide in terms that all mortgage and other private liens shall be superior to the lien of the general or local assessment liens provided for; since the legislative intent is clear to make the assessment lien superior. *Carstens & Earles v. Seattle*..... 88

18. MUNICIPAL CORPORATIONS — ASSESSMENTS — APPEAL — NECESSITY. The general local improvement law, 3 Rem. & Bal. Code, § 7892-1 *et seq.*, providing for notice to abutting owners of a hearing upon assessment rolls for local improvements, and for appeals to the superior court, and providing (§ 7892-70) that rights of action under existing laws, not commenced at the time the act takes effect, shall proceed under the provisions of the act, supersedes the prior acts whereby the property owners could obtain relief by an action in equity, and owners must now appeal or abide by the decision of the council, where the act went into effect before the assessment roll was made out, although the proceedings were commenced prior

MUNICIPAL CORPORATIONS—CONTINUED.

thereto under which the contract for the work was made. *In re Assessment for Local Improvement Sewer District No. 1 of Chehalis* 565

19. SAME—ASSESSMENTS—APPEAL—CHANGE OF PROCEDURE—RIGHTS OF CONTRACTOR. Although a new act could not affect any of his rights under his contract, a contractor for a local improvement has no such interest in the procedure by which the rights of the parties assessed could be asserted by action in equity, as to be able to object to a change in the procedure requiring owners to appeal to the superior court from a confirmation of the assessment roll, which manifestly did not prejudice his rights under his contract. *In re Assessment for Local Improvement Sewer District No. 1 of Chehalis* 565

20. MUNICIPAL CORPORATIONS—INJURY TO PEDESTRIANS—STREETS—NEGLIGENCE—LAST CLEAR CHANCE. Where pedestrians, struck by a taxicab just as they were stepping from the curb, were not seen by the driver, there is no room for the operation of the rule of last clear chance. *Laughlin v. Seattle Taxicab & Transfer Co*..... 342

21. MUNICIPAL CORPORATIONS—STREETS—INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where pedestrians saw an approaching taxicab eighty feet away, when nine feet from the curb as they entered the street, and were struck by the taxicab just as they stepped from the curb, findings that they were guilty of contributory negligence are sustained. *Laughlin v. Seattle Taxicab & Transfer Co*..... 342

22. MUNICIPAL CORPORATIONS — STREETS — NEGLIGENT USE — COLLISION WITH STREET CAR — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. The driver of an automobile was guilty of contributory negligence precluding any recovery, where it appears that, in making a right angle turn, he drove his car upon a street car track directly in front of an approaching street car, which was in plain sight, and was unable to stop in time to avoid a collision; his negligence being the proximate cause of the accident regardless of the speed of the approaching street car. *Briscoe v. Washington-Oregon Corporation* 29

23. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT. A contract by a city to purchase a private water system as part of a municipal plant does not create a general indebtedness, when the contract expressly provides that the cost shall not be a general obligation of the city, but shall be made a charge upon the revenues of the water system, and payable in semiannual installments. *Schooley v. Chehalis* 667

24. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT—WATER SYSTEM. Art. 8, § 6, of the state constitution prohibiting municipal indebted-

MUNICIPAL CORPORATIONS—CONTINUED.

ness in excess of five per cent of the taxable property, excepting that, in case of municipally owned water, light and sewer systems, it may incur an additional five per cent indebtedness, with the assent of three-fifths of the voters, does not contemplate that the excess of indebtedness for general purposes, which is void under the constitution, should be taken into account as a limitation on the indebtedness for a water system, since the constitution expressly authorizes indebtedness to the extent of five per cent of the assessed valuation for the purpose of purchasing, owning, and controlling such utilities as water systems. *Schooley v. Chehalis* 667

25. MUNICIPAL CORPORATIONS—BONDS—PROPOSITION—USE OF PROCEEDS. A proposition for the issuance of bonds for the purchase and maintenance of a water system is not illegal as contemplating the use of the proceeds of the bonds for maintenance purposes, in violation of the provision of Rem. & Bal. Code, § 8008, which provides that the maintenance of such a system shall be paid out of the revenues of the plant, since it will not be presumed that the city will do an illegal act, or that it will not perform its duty by fixing rates so as to maintain the plant from its revenues. *Schooley v. Chehalis*.... 667

26. MUNICIPAL CORPORATIONS — BONDS — PROPOSITION — MATURITY. A proposition for the issuance of bonds payable in twenty years, with an option to make payment at any time after ten years, is not open to the objection that the date of maturity is indefinite. *Schooley v. Chehalis* 667

27. MUNICIPAL CORPORATIONS—BONDS—ISSUANCE—SUBMISSION TO VOTERS—RATE OF INTEREST. A proposition for a bond issue by a city submitted to the voters thereof, in which the bond interest was stated as "at a rate not exceeding six per cent per annum," following the language of Rem. & Bal. Code, § 8007, is sufficient without fixing a definite rate of interest, as such bonds are the subject of competitive bids in the open market and it is common practice for a bidder to state the rate of interest which he is willing to accept. *Schooley v. Chehalis* 667

28. MUNICIPAL CORPORATIONS—CLAIMS FOR DAMAGES—AMENDMENT. A claim for personal injuries, filed under a city charter requiring the claim to embrace all items of damage known at the time, cannot be amended at the trial so as to include a known item for the employment of a nurse, not included in the claim as filed. *Wagner v. Seattle* 275

29. MUNICIPAL CORPORATIONS—CLAIMS FOR DAMAGES—AMENDMENT. Allowing a trial amendment of a claim for damages against a city as to the claimant's street number, changing the number from 218 to 208, is not prejudicial error, where there was a *bona fide* attempt to comply with the law and the notice accomplished its purpose of giving the city an opportunity to investigate the claim; the claimant

MUNICIPAL CORPORATIONS—CONTINUED.

having lived at 208 for six years and being well known to the occupants of No. 218, where proper inquiry would have disclosed claimant's residence. *Wagner v. Seattle*..... 275

MUTUALITY:

Of estoppels by parol evidence to vary written instrument, see EVIDENCE, 6.

NAVIGABLE WATERS:

See WATERS AND WATER COURSES, 4.

NECESSITY:

Of exceptions for purpose of review, see APPEAL AND ERROR, 5, 6.
Of pendency of court proceedings at time of newspaper comment thereon, see CONTEMPT, 1.
Of appeal from confirmation of assessment roll, see MUNICIPAL CORPORATIONS, 18.
Of alleging value of property, see ROBBERY.
For state board of medical examiners to employ private counsel, see STATES, 5.

NEGLIGENCE:

Liability of bailee for, see BAILMENT.
Of carrier, see CARRIERS.
Of guardian *ad litem*, see GUARDIAN AND WARD.
Of servant, see MASTER AND SERVANT, 7.
Of person injured on street, see MUNICIPAL CORPORATIONS, 21, 22.
In treating patient, see PHYSICIANS AND SURGEONS, 2, 3.

1. NEGLIGENCE — FIRES — EVIDENCE OF OTHER FIRES—ADMISSIBILITY. In an action for loss by fire originating from an open burner of a mill, evidence that other similar fires were set out in the vicinity by the burner is admissible, and such evidence is sufficiently definite if a witness testifies that he saw such fires originate from sparks from the burner. *Yamamoto v. Puget Sound Lumber Co*..... 411

2. SAME—FIRES—KNOWLEDGE OF OWNER. In an action for loss by fire, set out by an open burner of a mill, evidence tending to show knowledge by the owner of the mill that the burner was setting out fires is admissible, even if remote, its weight being for the jury. *Yamamoto v. Puget Sound Lumber Co*..... 411

3. NEGLIGENCE—FIRES—EVIDENCE—SUFFICIENCY. Liability for a fire is sustained, where there was direct evidence tracing the fire from the open burner of a mill, maintained by the defendant, to the buildings of the plaintiff. *Yamamoto v. Puget Sound Lumber Co.* 411

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see NEW TRIAL, 2-4.

NEWSPAPERS:

Comment by during pendency of action, see CONTEMPT.

NEW TRIAL:

Review of discretion in ruling on motion for, see APPEAL AND ERROR, 18, 19.

1. NEW TRIAL—GROUNDS—MISCONDUCT OF JURY. The fact that the jury accepted the evidence of one party rather than that of another does not show passion or prejudice. *Independent Order of Foresters v. Bonner* 13

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence will not be granted where it was only cumulative, and due diligence was not made to produce it at the trial. *Yamamoto v. Puget Sound Lumber Co*..... 411

3. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE—PROBABLE RESULT. Where the principal issue was as to whether the plaintiff, a physician, was authorized to perform an operation for removal of the Fallopian tubes and ovaries, defendant claiming that he was only authorized to remove the appendix, a new trial for newly discovered evidence showing that, after the trial, defendant had an operation to prove that the appendix had been removed, is properly refused for want of diligence, where, early in the trial, lasting several days, the plaintiff testified that he had not removed the appendix, and the defendant then offered to have the operation performed, but no operation was performed at that time and no continuance was asked, and the case was submitted on the evidence; especially where it is not satisfactorily shown that the new evidence would or ought to produce a different result. *Hoxsey v. Murray* 588

4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SURPRISE. A new trial on the ground of surprise and newly discovered evidence is properly denied, where the surprise consisted in rulings of the court in the progress of the trial inducing plaintiff to believe that the burden of proving thirty days' precedent notice of his claim was on defendant as a matter of defense, and plaintiff's newly discovered evidence of presenting his claim was insufficient, consisting of letters received long after expiration of the time limited. *Henry v. Chicago, Milwaukee & Puget Sound R. Co*..... 633

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of appeal, see APPEAL AND ERROR, 10.

Injury to live stock by carrier, see CARRIERS.

NOTICE—CONTINUED.

Service of process on foreign corporation, see CORPORATIONS, 3.
Of partition sale, see JUDICIAL SALES, 1.
Of claim against contractor's bond, see MUNICIPAL CORPORATIONS, 3.
Claim for damages, see MUNICIPAL CORPORATIONS, 28, 29.
Of action, see PROCESS.

NUISANCE:

Obstruction in street as public nuisance, see HIGHWAYS, 4.

OBJECTIONS:

By debtor to account rendered, see ACCOUNT STATED, 1-4.
Necessity for purpose of review, see APPEAL AND ERROR, 4, 14.
To defect of parties plaintiff, waiver, see PARTIES.

OBSTRUCTIONS:

Of highways, see HIGHWAYS, 4.
Of water course, see WATERS AND WATER COURSES, 1-3.

OFFICERS:

Liability for unlawful detention of suspected delinquent, see CONSTITUTIONAL LAW, 7.
Corporate officers, see CORPORATIONS.
Liability for detention of delinquent child without process, see FALSE IMPRISONMENT, 1, 2.
Injunctions affecting, see INJUNCTION.
Interpretation of plans by as estopping city, see MUNICIPAL CORPORATIONS, 9.
School officers, supervisory powers of state superintendent, see SCHOOLS AND SCHOOL DISTRICTS.
State officers, see STATES.

OPINION EVIDENCE:

In construction of contract, see CONTRACTS, 2.

ORDERS:

Review of, see APPEAL AND ERROR, 1.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1.

OWNERSHIP:

Title to beds of streams, see WATERS AND WATER COURSES, 4, 5.

PARENT AND CHILD:

Custody and support of children on divorce, see DIVORCE, 1, 6, 9, 11.
Exercise of guardianship by state, see INFANTS.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 3-7.

PARTIES:

Entitled to appeal, see APPEAL AND ERROR, 1, 2.
Entitled to allege error, see APPEAL AND ERROR, 3.
Rights and liabilities as to costs, see COSTS.
Liable for false imprisonment, see FALSE IMPRISONMENT.
Agent as real party in interest, in action to recover premiums, see INSURANCE, 5.
Entry of judgment against, see JUDGMENT, 3, 4.
Persons concluded by judgment, see JUDGMENT, 9, 10.
Liable for prosecution, see MALICIOUS PROSECUTION.
Persons entitled to mechanics' lien, see MECHANICS' LIENS.

1. PARTIES—DEFECT OF PARTIES PLAINTIFF—OBJECTION—WAIVER. An objection to defect of parties plaintiff and that plaintiff is not the real party in interest must be taken by demurrer or answer, and is too late when raised for the first time on appeal. *Lamb v. Connor* 121

PARTITION:

See JUDICIAL SALES.
Parties entitled to appeal from order vacating sale, see APPEAL AND ERROR, 1.
Negligence of guardian *ad litem* in defending action, see GUARDIAN AND WARD.

PARTNERSHIP:

Appointment of receiver for, construction of order, see RECEIVERS, 1.

1. PARTNERSHIP—RELATION—EXISTENCE—EVIDENCE—SUFFICIENCY. In a proceeding for the appointment of a partnership administrator of a decedent's estate, findings that a saloon business was the partnership business of the deceased and his brother, are sufficiently supported by the evidence, although the deceased paid one-half of the purchase price of $14,000 from his own funds and gave his own obligations to secure the balance, the business was conducted in his name, and no division of profits was made, where it appears that he repeatedly declared that his brother had an interest in the business, and was a partner therein, that the brother actively participated in the management, doing half the work, and drew no fixed wage, that he kept the books, made deposits and performed the general duties of a partner; that the unpaid portion of the purchase price was entirely paid from the proceeds, and the sum taken from the business by deceased was no more than his advances and reasonable interest. *In re Welch's Estate* 558

2. PARTNERSHIP—DISSOLUTION—APPLICATION FOR RECEIVERSHIP—DESCRIPTION OF PROPERTY. A complaint asking for the appointment of a receiver for a partnership and describing the property involved as notes, accounts, personal property and lands, will not be held an in-

PARTNERSHIP—CONTINUED.

sufficient description, where the extent and condition of the property depends upon the books and accounts of the partnership, which are in the hands of the partner objecting to a receivership, and which must be presumed as showing the affairs and property of the partnership. *Martin v. Wilson*..... 625

3. PARTNERSHIP—DISSOLUTION—RECEIVERSHIP. In an action for an accounting between law partners, the appointment of a temporary receiver is warranted, where it appears that the parties are so hostile that there can be no reconciliation, one of the firm, by his control of the books, excludes the other from participation in their affairs, accounts are due the firm, and there are debts to be paid, and property to be cared for. *Martin v. Wilson*..... 625

PAYMENT:

Of taxes to sustain adverse possession, see ADVERSE POSSESSION, 2.
As precluding recovery over from city for damages sustained by injured employee, see INDEMNITY.
Of rent as affecting tenant's right to recover for repairs made, see LANDLORD AND TENANT, 3.
Default by vendee in conditional sale contract, waiver of, see SALES, 10.
Taxes, see TAXATION, 3.

PENDENCY OF ACTION:

During newspaper comment on court proceedings, see CONTEMPT.

PERFORMANCE:

Of contract for public improvement, see MUNICIPAL CORPORATIONS, 13.
Of contract for state building, see STATES, 1.
Of contract for services, see WORK AND LABOR, 1.

PERSONAL INJURIES:

Right of contractor to recover over from city for damages paid injured employee, see INDEMNITY.
To employee, see MASTER AND SERVANT, 3-7.
To person on city street, see MUNICIPAL CORPORATIONS, 20-22.

PETITION:

To vacate default judgment, see JUDGMENT.

PHYSICIANS AND SURGEONS:

Power of state board of medical examiners to employ private counsel, see STATES, 4, 5.

1. PHYSICIANS AND SURGEONS—ACTIONS FOR SERVICES—ISSUES—EVIDENCE—ADMISSIBILITY. In an action to recover for the services of a physician in the removal of the Fallopian tubes and the ovaries, made necessary, according to plaintiff's testimony, by a diseased

PHYSICIANS AND SURGEONS—CONTINUED.

condition of those organs caused by the defendant's attempt to produce an abortion upon herself by the use of a catheter, evidence of statements made by the defendant to the plaintiff and others that she used a catheter upon herself for that purpose is admissible upon an issue as to whether the operation was necessary or was authorized by the defendant. *Hoxsey v. Murray*..... 588

2. PHYSICIANS AND SURGEONS — NEGLIGENCE — WHAT CONSTITUTES. Where there is more than one method of treating a fractured bone, the attending surgeon is not liable for an honest mistake of judgment in selecting a method recognized as proper by a respectable minority of the medical profession. *Lorenz v. Booth*..... 550

3. PHYSICIANS AND SURGEONS—MALPRACTICE—ACTIONS — EVIDENCE — SUFFICIENCY. In an action to recover damages for malpractice in the treatment of a broken leg, on the ground of resulting infection to the limb, the evidence is insufficient to sustain a recovery, where it appears that the surgeon adopted the Lane, or plate, method for uniting the fracture and that the bone united properly, leaving the leg straight and of normal length; that infection set in, requiring prolonged treatment and the calling in of another physician to eradicate it; that infection may occur in any surgical case though carefully guarded against; but there was no evidence that the infection was caused by the method of setting the leg, or that every precaution looking to the prevention of infection was not exercised at the hospital where the leg was set. *Lorenz v. Booth*..... 550

PLANS:

For public improvement, warranty of, see MUNICIPAL CORPORATIONS, 4.

Change in plan of public improvement, see MUNICIPAL CORPORATIONS, 6-12.

Change in as avoiding liability of subscriber to building fund, see SUBSCRIPTIONS.

PLEADING:

See ACCOUNT STATED.

Amendment on appeal, see APPEAL AND ERROR, 13-15.

In action for divorce, see DIVORCE, 2.

Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.

In action brought under Federal employer's liability act, see MASTER AND SERVANT, 3.

In action for damages caused by independent contractor engaged in inherently dangerous work, see MASTER AND SERVANT, 8.

1. PLEADING — ANSWER — GENERAL ISSUE — COUNTERCLAIM. It is not error to sustain a demurrer to an answer setting up affirmative matter admissible under the general denial, but which might have been properly pleaded as a counterclaim. *Bunck v. McAulay*..... 473

PLEADING—CONTINUED.

2. PLEADING — ANSWER TO AMENDED COMPLAINT — STRIKING MATTERS PREVIOUSLY WAIVED. Where the defendant in an action of replevin for two motor cars waived his counterclaim as to damages for one of the cars, and agreed to judgment in favor of plaintiff for the possession of such car, he could not, in an answer to an amended complaint for the replevin of the other car, interpose a counterclaim for the damages so waived. *Winton Motor Carriage Co. v. Blomberg* 451

3. PLEADING—NEW MATTER IN REPLY—TIME FOR—STRIKING—DISCRETION. In an action for the death of an employee unloading coal cars at a bunker, alleged to have been caused by the use of unsafe cars, whereby the employee fell into the bunker when the trapdoor of the car suddenly opened, in which the answer set up contributory negligence and assumption of risks, new matter set up in plaintiff's reply after the case was called for trial, to the effect that defendant had caused the plaintiff to work for a longer period than sixteen hours, in violation of the Federal statute, introduced a new element of damages, which would require time for preparation to meet; and, therefore, it was not an abuse of discretion on the part of the court to strike the same, in the absence of a motion for a continuance. *Bjornsen v. Northern Pac. R. Co*..... 220

4. PLEADINGS—AMENDMENTS—FAILURE TO OBJECT TO EVIDENCE. Where a mistake was made in the name of an assignor given as T. Tamari, and A. Tamari testified without objection that he was the person intended and who sustained the loss, the pleading will be deemed amended. *Yamamoto v. Puget Sound Lumber Co*..... 411

POLICY:

Of insurance, see INSURANCE.

POLLUTION:

Of water course, see WATERS AND WATER COURSES, 7.

POSSESSION:

Character of to establish title, see ADVERSE POSSESSION.

POWERS:

Of cities to condemn lands for supplying water system, see EMINENT DOMAIN, 1, 2.

Of supreme court to grant writ of habeas corpus to admit to bail pending appeal, see HABEAS CORPUS.

Of state to exercise guardianship over child, see INFANTS.

Of state superintendent to refuse apportionment of school funds, see SCHOOLS AND SCHOOL DISTRICTS.

Of state board of medical examiners to employ private counsel, see STATES, 4, 5.

PRACTICE:

See APPEAL AND ERROR; CRIMINAL LAW; DIVORCE; EVIDENCE; JUDGMENT; MANDAMUS; NEW TRIAL; PARTIES; PLEADING; TRIAL.

PREFERENCES:

Right to purchase tide and shore lands, see PUBLIC LANDS.

PREJUDICE:

Presumptions as to on appeal, see APPEAL AND ERROR, 17.
Ground for reversal in civil actions, see APPEAL AND ERROR, 27-32.
Newspaper comment as prejudice to party pending action, see CONTEMPT, 2.

PREMIUMS:

For insurance, see INSURANCE, 2, 5, 6.

PRESCRIPTION:

Establishment of highways, see HIGHWAYS, 2, 3.

PRESENTMENT:

Of claim for damages in carriage of live stock, see CARRIERS.

PRESUMPTIONS:

As to assent of debtor to account rendered, see ACCOUNT STATED, 1, 3.
On appeal, see APPEAL AND ERROR, 16, 17.
Negligence of bailee, see BAILMENT, 2.
As to public use of property condemned, see EMINENT DOMAIN, 4.
As to public highway, see FERRIES, 2.
As to public nature of wharf, see WHARVES, 2.

PRICE:

Inadequacy of as ground for vacation of partition sale, see JUDICIAL SALES, 3.

PRINCIPAL AND AGENT:

See BROKERS.
Corporate officers and agents, see CORPORATIONS.
Appropriation of funds by agent, see EMBEZZLEMENT.
Insurance agents, see INSURANCE, 1, 3-5.
Agency contract, see SALES, 7.

1. PRINCIPAL AND AGENT — SCOPE OF APPARENT AUTHORITY — STORE MANAGER. A sale of goods to the manager of a retail store for the purpose of replenishing its stock, is within the apparent scope of his authority; and where the retail store was but the *alter ego* of the defendant and its agent to dispose of the stock, the seller was justified in charging the account to defendant upon the manager's request. *Spokane Merchants Association v. Clere Clothing Co*.... 616

PRINCIPAL AND AGENT—CONTINUED.

2. PRINCIPAL AND AGENT—DEALINGS BETWEEN—CONTRACTS—TITLE OF PRINCIPAL—RIGHTS OF THIRD PERSON. A contract providing that the title to an automobile should be vested in an agent for the purpose of facilitating the agent's making repairs and effecting a sale of the car on commission, and the bill of sale pursuant thereto, does not divest the owner of his interest, or make the car subject to execution for the debts of the agent; nor does the subsequent bill of sale merge the original contract. *Ransom v. Wickstrom & Co.* 419

PRINCIPAL AND SURETY:

Liability of surety in supersedeas bond, for alimony pending appeal, see DIVORCE, 13.

PRIORITIES:

Of labor liens, see CHATTEL MORTGAGES.
Of mechanics' liens, see MECHANICS' LIENS.
Of assessment lien over mortgage or contract liens, see MUNICIPAL CORPORATIONS, 15-17.

PROBABLE CAUSE:

For prosecution, see MALICIOUS PROSECUTION.

PROCESS:

See CORPORATIONS, 8.
On appeal, see APPEAL AND ERROR, 10.
Defect in as ground for vacation of judgment, see JUDGMENT, 8.

1. PROCESS—SERVICE—SUBSTITUTED SERVICE—"AT HOUSE"—STATUTES. A valid service of a summons and complaint is made upon a wife, in a matter affecting community property, by delivering a copy thereof for her to her husband, upon the community premises, and within thirty feet of the dwelling house, upon being informed by the husband that she was not at home; in view of Rem. & Bal. Code, § 226, authorizing such service by leaving a copy "at the house" of her usual abode, with a person of suitable age and discretion then resident therein. *State ex rel. Pacific Loan & Investment Co. v. Superior Court* 392

PROHIBITION:

1. PROHIBITION — TO COURTS — WHEN LIES — ADEQUACY OF APPEAL. After sale to the plaintiff, confirmation thereof, and expiration of the year for redemption, prohibition lies to prevent the vacation of a decree of foreclosure, sought on the ground that the decree was void for want of personal service of the summons and complaint; since there is no adequate remedy by appeal, inasmuch as, on a retrial of the foreclosure proceeding, the question of the validity of the order setting aside the decree could not be raised, and there is no appeal from an order vacating a judgment. *State ex rel. Pacific Loan & Investment Co. v. Superior Court*..... 392

PROHIBITION—CONTINUED.

2. PROHIBITION—TO COURTS—WHEN LIES—PENDING APPEAL—DIVORCE—ALIMONY. Upon an appeal from an order adjudging defendant in a divorce case guilty of contempt for failing to pay weekly alimony, prohibition lies to prevent the superior court, pending appeal to the supreme court, from attempting to enforce its judgment by imprisonment, for future as well as past installments of alimony, on the ground that the trial court is without jurisdiction after appeal to imprison in aid or in execution of its judgment, and on the further ground that a citizen cannot be vexed in his person, liberty or property pending an appeal to a court having jurisdiction to settle the law of his case. *Surry v. Surry*..... 269

PROMISSORY NOTES:

See BILLS AND NOTES.

PROOF:

Of loss insured against, see INSURANCE, 3, 4.

PROPERTY:

Adverse possession, see ADVERSE POSSESSION.
Right to question title to real estate held by alien, see ALIENS.
Division of on divorce, see DIVORCE, 9-11.
Taking or damaging for public use, see EMINENT DOMAIN.
Subject to execution, see EXECUTION, 1.
Subject to laborer's lien, see MASTER AND SERVANT, 1, 2.
Value of, see REPLEVIN.
Necessity of alleging value of, see ROBBERY.

PROSTITUTION:

Charging offense of placing wife in house of prostitution, see INDICTMENT AND INFORMATION.

1. PROSTITUTION—"PLACE"—STATUTE—CONSTRUCTION. Under Rem. & Bal. Code, § 2440, making it a felony to "place" a female in a house of prostitution with intent that she shall live the life of a prostitute, it is proper to refuse an instruction that the word "place" implies a moral or physical restraint or force; the term meaning merely the furnishing of a place or opportunity. *State v. Hanes*..... 601

2. PROSTITUTION—DEFENSES—STATUTE. Under Rem. & Bal. Code, § 2440, providing that every person who shall place a female in a house of prostitution, with intent that she shall live the life of a prostitute, shall be punished, etc., it is no defense that the female was a prostitute. *State v. Hanes*..... 601

3. SAME—KNOWLEDGE OF DEFENDANT—EVIDENCE—SUFFICIENCY. A conviction for placing a female in a house of prostitution with intent that she live the life of a prostitute is sustained by proof that defendant was keeper of a livery stable where he had rooms and con-

PROSTITUTION—CONTINUED.

sorted with the woman, that she plied her trade at will, and there was evidence warranting the jury in finding that he knew she was practicing prostitution for money and gave him part of her earnings, although he denied such knowledge. *State v. Hanes*..... 601

4. PROSTITUTION—INFORMATION — SUFFICIENCY. Under Rem. & Bal. Code, § 2440, subd. 1, making it a felony to place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution . . . etc., an information charging the accused with placing his wife in charge of another for immoral purposes, to wit, in the charge of S., although following the language of the statute, is insufficient, since the statute is couched in general terms, capable of being applied to a variety of acts, making it necessary to charge the act or acts relied upon falling within the general terms of the statute. *State v. Dodd*..... 436

5. SAME. For the same reason, under Rem. & Bal. Code, § 2440, subd. 5, making it a felony to solicit any person to go to a house of prostitution for any immoral purpose, an information in the language of the statute is insufficient if it fails to charge what particular immoral purpose or purposes the solicitation covered and were relied upon to constitute the offense. *State v. Dodd*..... 436

6. SAME. Under Rem. & Bal. Code, § 2440, subd. 5, making it a felony to solicit any person to have sexual intercourse with a common prostitute, an information charging the accused with soliciting a person to have sexual intercourse with one D. with intent that she should become a common prostitute is insufficient. *State v. Dodd* 436

PROVINCE OF COURT AND JURY:

In civil actions, see TRIAL, 4.

PUBLIC DEBT:

See MUNICIPAL CORPORATIONS, 23-27.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 2-19.

PUBLIC LANDS:

Title by adverse possession, see ADVERSE POSSESSION, 1.
Grant of use to county in operation of ferry, see FERRIES.
Enjoining reappraisement and sale of, see INJUNCTION, 2.

1. PUBLIC LANDS — TIDE AND SHORE LANDS — PREFERENCE RIGHT TO PURCHASE—PROCEEDINGS—APPLICATION—SUFFICIENCY. Upon the filing of conflicting applications for the purchase of state tide lands by persons claiming to be the owners of the abutting uplands, whereupon, pursuant to Rem. & Bal. Code, § 6750, the state board of land commissioners required the submission under oath of a full state-

PUBLIC LANDS—CONTINUED.

ment of the facts whereby the parties claimed a preference right to purchase, an applicant may abandon his claim as an abutting owner and base his preference right to purchase upon the fact of his improvement of the tide lands prior to March 26, 1890; since the above act expressly provides that the affidavit, required on the filing of conflicting claims, shall be the only pleading required and shall be deemed denied by all the other applicants. *Book v. West*..... 107

2. PUBLIC LANDS—SHORE LANDS—PREFERENCE PRIVILEGES — APPEAL — CANCELLATION—STATUTES. The "cancellation act" of 1899 (Rem. & Bal. Code, §§ 6751-6753), providing for the withdrawal and cancellation of preference rights to purchase "tide lands" of the first class, and authorizing the dismissal of appeals taken from the board of state land commissioners in which no trial has been had for a period exceeding two years, applies also to, and is incorporated into the "shore land act" of 1907, Laws 1907, p. 4 *et seq.*, providing for the disposition of "shore lands" on Lakes Washington and Union, with a preference right of purchase to abutting owners "under existing laws," in view of the constant reiteration of the last quoted words, and § 5 of the act (Laws 1907, p. 6), wherein it is declared that "the provisions of any existing law of this state relating to the selection, survey . . . and disposition of the state's granted, school, tide, oyster and other lands or harbor areas, or any other law of this state applicable thereto, shall control and govern," the sale and disposition of the shore lands covered by the act, except as modified by the provisions of the act; there being no provision in the "shore land act" itself for the cancellation of preference rights or the dismissal of appeals in proceedings thereunder, except as the act incorporates "existing laws." *State ex rel. Board of State Land Commissioners v. McGilvra*..... 487

3. PUBLIC LANDS—SHORE LANDS—PREFERENCE PRIVILEGES — APPEAL — CANCELLATION — TOLLING STATUTE. The statutory withdrawal and cancellation of preference privileges to purchase tide lands, for delay in prosecuting appeals from the board of state land commissioners, declared by Rem. & Bal. Code, § 6751, and the authority to the Attorney General given by Id., § 6752, to move the dismissal of such appeals, cannot be abrogated or suspended by independent litigation touching such shore lands nor by any agreement of the state land commissioner to allow the appeals to rest *in statu quo*. *State ex rel. Board of State Land Commissioners v. McGilvra*..... 487

PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

PUBLIC WHARVES:

See WHARVES.

QUANTUM MERUIT:

See WORK AND LABOR.

QUESTION FOR JURY:

Delay in objecting to account rendered, see ACCOUNT STATED, 3.
Construction of contract, see CONTRACTS, 2.
In civil actions, see TRIAL, 4.

RAILROADS:

Carriage of goods and passengers, see CARRIERS.
Appropriation of property, see EMINENT DOMAIN, 6, 7.
As employers, see MASTER AND SERVANT, 3, 6, 7.
Taxation, see TAXATION.

RATES:

Of interest on municipal bonds, see MUNICIPAL CORPORATIONS, 27.

REAL ESTATE AGENTS:

See BROKERS.

REASONABLE DOUBT:

In favor of party accused of contempt by newspaper comment on judicial proceedings, see CONTEMPT, 2.

REBATES:

Of premiums for insurance, see INSURANCE, 1, 2.

RECEIVERS:

In actions for dissolution of partnership, see PARTNERSHIP, 2, 3.

1. RECEIVERS—APPOINTMENT—CONSTRUCTION OF ORDER. An order appointing a receiver for a law partnership, does not authorize the receiver to take charge of the business of the firm pending in the courts, where it merely directs the receiver to collect outstanding accounts, notes and obligations of every kind due the firm, with power to assemble and bring suit for obligations due, followed by a general direction "to take charge of any and all business of every kind and nature belonging to said firm." *Martin v. Wilson*..... 625

2. RECEIVERS—ACTION FOR RENT — IMPROVEMENTS — RECOUPMENT. A lessee's payments for improvements agreed to be made by the lessor being equivalent to payments of so much rent, the same should be allowed against the lessor's receiver, upon the lessor's insolvency. *Thomson Estate v. Washington Investment Co*..... 326

RECORDS:

See CHATTEL MORTGAGES.
On appeal, see APPEAL AND ERROR, 11.
As evidence in criminal trial, see CRIMINAL LAW, 3.
Of conditional sales contracts, see SALES, 7, 8.

RECOUPMENT:

By tenant for repairs made, see LANDLORD AND TENANT, 3; RECEIVERS, 2.

REDUCTION:

Of damages as curing error, see APPEAL AND ERROR, 27.

REFERENDUM:

Emergency acts defeating right to, review by courts, see CONSTITUTIONAL LAW, 1.

Laws subject to, see STATUTES, 5.

REFORMATION:

Of judgment on appeal, see APPEAL AND ERROR, 33.

REGISTRATION:

Of chattel mortgages, see CHATTEL MORTGAGES.

REGULATION:

Act regulating sale of stock food as class legislation, see CONSTITUTIONAL LAW, 2-4.

Of insurance rates, see INSURANCE, 1.

RELIANCE:

Upon representations, see FRAUD, 1.

REMEDY AT LAW:

Effect on jurisdiction of equity, see INJUNCTION, 1.

REMISSION:

Of damages as curing error, see APPEAL AND ERROR, 27.

RENDITION:

Of account, see ACCOUNT STATED.

RENEWAL:

Of lease, see LANDLORD AND TENANT, 1.

RENT:

See LANDLORD AND TENANT, 1, 3.

Allowance against receiver of amount paid by tenant for improvements, see RECEIVERS, 2.

REPAIRS:

Liability for, see LANDLORD AND TENANT, 2, 3.

REPEAL:

Implied repeal of statute relating to former jeopardy, see CRIMINAL LAW, 4.

REPEAL—CONTINUED.

Of statutes limiting power of cities to condemn lands for water supply, see EMINENT DOMAIN, 1, 2.
Of amending ordinance, see MUNICIPAL CORPORATIONS, 1.
Of statute, see STATUTES, 2.

REPLEVIN:

Bar of matters by former judgment, see JUDGMENT, 15.
Of goods held under conditional sales contract, see SALES, 10.

1. REPLEVIN—VALUE OF PROPERTY—STATEMENT IN AFFIDAVIT. In an action of replevin, the value stated in the affidavit should be taken as the true value at the time of taking, where the defense presents no evidence of a different value. *Winton Motor Carriage Co. v. Blomberg* 451

2. REPLEVIN—PROOF OF VALUE—SUFFICIENCY. In replevin for property conditionally sold, proof of the amount due under the contract is sufficient proof of the value of the property to uphold a money *berg* 451

REPLY:

Striking new matter in reply, see PLEADING, 3.

RESCISSION:

Of contract of sale, see SALES, 2, 3.

RES JUDICATA:

See JUDGMENT, 9-15.

REVENUE:

See TAXATION.

REVERSAL:

Of conviction for insufficient information, effect of dismissal, see CRIMINAL LAW, 10.

REVIEW:

See APPEAL AND ERROR; CERTIORARI.
In criminal prosecution, see CRIMINAL LAW, 9, 10.

REVOCATION:

Of order awarding alimony to wife, see DIVORCE, 8.

RIPARIAN OWNERS:

See WATERS AND WATER COURSES, 6.

RIPARIAN RIGHTS:

See WATERS AND WATER COURSES, 6, 7.
Compensation for, waiver of, see EMINENT DOMAIN, 5.

ROADS:

See HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS, 20-22.

ROBBERY:

1. ROBBERY—INFORMATION—VALUE OF PROPERTY—NECESSITY OF ALLEGATION. The value of goods taken is not an element of the crime of robbery, and hence need not be alleged, under Rem. & Bal. Code, § 2418, which provides that "robbery is the unlawful taking of personal property from the person of another, . . . by means of force or violence or fear of injury." *State v. Rowan*..... 158

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 7.

SALES:

See JUDICIAL SALES.

Sheriff's certificate of sale as color of title, see ADVERSE POSSESSION, 2.

On execution, see EXECUTION.

Fraud inducing sale, see FRAUD.

By agents, see PRINCIPAL AND AGENT.

Of realty, see VENDOR AND PURCHASER.

1. SALES—CONTRACTS—CONSTRUCTION. Where a contract partly written on a printed form, for the sale of apples on consignment, provided in the printed part that the consignor agreed to pool his apples with other growers and sell for the pool price and that the factor "shall not sell any fruit for less than the minimum prices as hereinafter stated," leaving blank columns at the end of the printed form for the number of boxes, variety and minimum prices, which columns were not filled out, but the words were stricken and the space used for writing in an agreement whereby the consignee agreed to sell specified varieties for the pool prices of the factor, "with an advance on the following varieties," of certain specified sums, the written part fixing the agreement for advances cannot be construed as the "minimum price" mentioned in the printed form, since the latter words were evidently permitted to remain in the form by inadvertence and no minimum price was agreed to; the words "advance" and "minimum price" not being synonymous in any sense; and there being no provision of the contract expressly showing an intention to base the minimum price on the advances specified, there was no ambiguity in the contract. *Eighme v. Holcomb*..... 145

2. SALES—CONTRACTS — RESCISSION BY BUYER — ACTS CONSTITUTING. A finding that defendant rescinded a contract for the purchase of an electric piano is sustained by the evidence, although there was no formal rescission by a return of the instrument, when it appears that this was due to promises of plaintiffs to put the instrument in

SALES—CONTINUED.

good condition, and also to subsequent negotiations looking to an exchange for another instrument; that, from the time of its first delivery, defendant insisted that the instrument did not comply with the representations which induced the contract, and refused to make additional payments on that ground, which in itself was sufficient to constitute notice of rescission. *Schroeder v. Hotel Commercial Co.* 685

3. SALES—RESCISSION—WAIVER. Delay in formal rescission, induced by promises of the vendor of an instrument to make it work properly, is not a waiver of the right to rescind. *Schroeder v. Hotel Commercial Co.* 685

4. SALES—DELIVERY—TO CARRIER — CONSIGNMENT. Where the seller of a car of lumber took out a bill of lading, naming the purchaser as both consignor and consignee, and delivered the car to the railroad company, there was a delivery of the lumber to the purchaser. *Orillia Lumber Co. v. Chicago, Milwaukee & Puget Sound R. Co.*. 362

5. SALES—RIGHTS OF PARTIES—WHEN TITLE PASSES—LACHES—BONA FIDE PURCHASERS. Upon a sale of a car of lumber upon condition that ninety per cent of the purchase price should be paid on delivery of the bill of lading, the general rule is that the title would remain in the seller until the payment is made; but the seller is guilty of such laches as to estop him from claiming title as against a *bona fide* purchaser from the consignee, where the seller took out a bill of lading naming the purchaser as both consignor and consignee, and delivered the car to the railroad company, and the seller's agent to collect the ninety per cent took the bill of lading and invoice to the purchaser's office, demanded payment, and left it there to be checked up, on the promise that it would be paid for at 1 p. m. of that day, at which time the purchaser refused to pay for the lumber or return the bill; this, on the theory that, of two innocent parties to suffer from the fraud of another, the loss should fall upon the one who has enabled the third person to do the wrong (overruling Id., 81 Wash. 611, 143 Pac. 152). *Orillia Lumber Co. v. Chicago, Milwaukee & Puget Sound R. Co.* 362

6. SALES—FAILURE OF CONSIDERATION—SUFFICIENCY OF EVIDENCE. A failure of consideration for the giving of a promissory note on the sale of a stallion, warranted to get sixty per cent of producing mares with foal with proper care and handling, is not established by evidence showing that only forty-four per cent of the mares served produced foals, when there was no showing as to what proportion of the mares served were producing mares. *McLaughlin v. Dopps*. 442

7. SALES—CONDITIONAL SALES—AGENCY CONTRACT. A contract providing that the title to an automobile should be vested in an agent for the purpose of facilitating the agent's making repairs and effect-

SALES—CONTINUED.

ing a sale of the car on commission, a joint possession being maintained, is not a conditional sales contract that must be recorded, but merely a contract creating an agency. *Ransom v. Wickstrom & Co.* 419

8. SALES—CONDITIONAL SALES—FILING—NECESSITY—LIENORS OR SUBSEQUENT CREDITORS. Where a conditional sales contract of the personal property used in operating a mine was not filed in the auditor's office within ten days after taking possession, it is, under Rem. & Bal. Code, § 3670, deemed to be an absolute sale as to subsequent creditors, which include subsequent claimants for liens for labor performed in the operation of the mine. *Cook v. Washington-Oregon Corporation* 68

9. SALES — CONDITIONAL SALES — REMEDIES OF SELLER — DEFENSES — BREACH OF CONTEMPORANEOUS CONTRACT — DAMAGES—COUNTERCLAIM. Under a conditional sales contract of goods, whereby the seller retains title thereto until payment in full, he would not forfeit such right of title from the fact that the purchaser suffered damage by reason of the seller's breach of a contemporaneous contract to diligently pursue sales prospects furnished by the purchaser, upon which a commission was to be allowed and applied on the purchase price; but such damages would merely be a subject of counterclaim, entitling the purchaser to recover for any damages actually suffered. *Kohler & Chase v. Turner*..... 192

10. SALES — CONDITIONAL SALES — ACTIONS — DEFENSES — DEFAULT — WAIVER. In an action of replevin for two motor vehicles, conditionally sold and in possession of a vendee in default, the defense of waiver of prompt payment on one car, is properly withdrawn from the jury, where the waiver was in consideration of prompt payment of sums due upon the other car, which payments had not been promptly paid. *Winton Motor Carriage Co. v. Blomberg*..... 451

SCHOOLS AND SCHOOL DISTRICTS:

Mandamus to compel apportionment of school funds, see MANDAMUS.

1. SCHOOLS AND SCHOOL DISTRICTS — STATE SCHOOL FUNDS — APPORTIONMENT—STATE SUPERINTENDENT—SUPERVISORY POWERS—STATUTORY PROVISIONS. Under 3 Rem. & Bal. Code, § 4562, providing that the superintendent of public instruction shall apportion to the several counties such current school funds as have been certified by the state auditor to be on hand, and 2 Id., § 4563, providing that, for the purpose of such apportionment, the state superintendent shall base his calculations upon the days' attendance as shown by the several county superintendents' last annual reports filed in his office, the state superintendent has discretionary power to refuse to apportion funds for attendance during a period of five days, shown by a county superintendent's report to extend over a portion of the summer va-

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

cation during which it was contrary to law to hold school, in view of the very wide supervisory powers given the state superintendent by 2 Id., §§ 4303 and 4307. *State ex rel. School District No. 301 v. Preston* 79

SECOND APPEAL:

Right to after abandonment of appeal, see APPEAL AND ERROR, 7.

SECONDARY EVIDENCE:

In civil actions, see EVIDENCE, 1.

SELF-DEFENSE:

See CRIMINAL LAW, 9.
Right to invoke doctrine, see ASSAULT AND BATTERY, 2.

SERVICE:

Of process on foreign corporation, see CORPORATIONS, 3.
Of process, see PROCESS.
Personal services, see WORK AND LABOR.

SET-OFF AND COUNTERCLAIM:

Pleading matter of set-off or counterclaim, see PLEADING, 1, 2.
Right of purchaser to counterclaim for damages, in action on conditional sales contract, see SALES, 9.

SHERIFFS AND CONSTABLES:

Sheriff's deed, see EXECUTION, 3, 4.

SHORE LANDS:

Preference right to purchase, see PUBLIC LANDS.

SLANDER:

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE:

Of lease, see LANDLORD AND TENANT, 1.

1. SPECIFIC PERFORMANCE — CONTRACTS — CERTAINTY. The rule that specific performance of an executory contract will not be decreed unless all its terms are certain does not apply to a contract party executed which by its terms can be made certain. *Faucett v. Northern Clay Co.* 382

2. SPECIFIC PERFORMANCE — CONDITION PRECEDENT — TENDER OF PURCHASE PRICE. While a vendor cannot declare a forfeiture of an executory contract at a time when he is unable to convey title in conformity with his agreement, still if he does so, the vendee cannot sue in equity for a specific performance without paying or offering to pay the purchase price; and in the absence of proof of willingness and ability to pay the price, the action must be dismissed. *Boger v. Bell* 131

STATES:

Right to question title to real estate held by alien, see ALIENS.
Legislative power, infringement by court, see CONSTITUTIONAL LAW, 1.
Legislative power, delegation of, see CONSTITUTIONAL LAW, 6.
Exercise of guardianship over child, see INFANTS.
Public lands, see PUBLIC LANDS.
Construction of statutes adopted from other states, see STATUTES, 3.
Grant to county for use of wharf for ferry approach, see WHARVES.

1. STATES—BUILDING CONTRACTS—PERFORMANCE — FINAL ACCEPTANCE —ACTION ON BOND—MATERIALMEN. The architect's final certificate of construction is a conclusive acceptance of a building erected under the direction of the state board of control, where the contract gave the architect complete control of the work, and provided for payments on the architect's certificates, the final payment to be made when the work was completed, and accepted by the "owner and architect," and that no certificate except the final one shall be conclusive evidence of the performance of the contract; hence a materialman, in order to maintain an action on a bond given to secure the performance of the contract, must file a claim within thirty days after such acceptance of the work, as required by Rem. & Bal. Code, § 1161. *McGowan Brothers Hardware Co. v. Fidelity & Deposit Co.* 470

2. SAME — CONTRACTS — FINAL ACCEPTANCE — DELEGATION TO ARCHITECTS. Where the state board of control has been given power to contract for public buildings, without limitations forbidding such delegation, it may delegate to the architects the right to determine when the work contracted for conforms to the contract and specifications, and to finally accept the work if the contract was satisfied in that regard. *McGowan Brothers Hardware Co. v. Fidelity & Deposit Co.* 470

3. STATES — CONTRACTS—ACCEPTANCE BY ARCHITECT — IMPEACHMENT. An architect's certificate of the completion of a state building cannot be impeached, in the absence of a showing of fraud on his part, by the fact that the date of completion was recited as of a later day in a labor report of the state's construction superintendent. *McGowan Brothers Hardware Co. v. Fidelity & Deposit Co*..... 470

4. STATES—BOARD OF MEDICAL EXAMINERS — POWERS — EMPLOYMENT OF COUNSEL—"NECESSITY." The state board of medical examiners has no implied power to employ private counsel at the expense of the state, by reason of being charged with duties making such legal advice a necessity, when the law has made the attorney general or the prosecuting attorneys of the county the legal representatives of the board; since the term "necessity" in such case means a "legal necessity" and not an "actual necessity" by reason of the public at-

STATES—CONTINUED.

torneys refusing to perform their duties; hence allegations as to such refusal are immaterial. *State ex rel. State Board of Medical Examiners v. Clausen* 279

5. SAME—BOARD OF MEDICAL EXAMINERS. Rem. & Bal. Code, § 8386 *et seq.*, as amended, being a complete act regulating the practice of medicine and the issuance of licenses therefor, and making certain violations of the act felonies or misdemeanors, and authorizing the state medical board to prosecute all persons guilty of violation of the act, but failing to expressly authorize the board to employ private counsel, and failing to provide any special punishments or procedure for prosecuting offenders, stands on the plane of the general criminal statutes as respects violations of the act and punishments therefor, and such duties therefore fall upon the prosecuting attorneys, and the state medical board has no authority to employ private counsel to perform such duties, notwithstanding that the board is authorized to "prosecute" offenders; nor can the board employ private counsel at the expense of the state for the purpose of securing legal advice, the constitution having made the attorney general the legal adviser of all state officers, which includes the members of such boards. *State ex rel. State Board of Medical Examiners v. Clausen* 279

STATUTES:

See MECHANICS' LIENS; TAXATION, 5.
Priority of labor liens, see CHATTEL MORTGAGES.
Time of taking effect, emergency clause, see CONSTITUTIONAL LAW, 1.
Class legislation, see CONSTITUTIONAL LAW, 2-5.
Service of process on foreign corporations, see CORPORATIONS, 3.
Former jeopardy, implied repeal, see CRIMINAL LAW, 4.
Granting power to cities to condemn lands for water system, see EMINENT DOMAIN, 1, 2.
Construction of act to regulate standard of insurance rates, see INSURANCE, 1.
Federal employers' liability act, see MASTER AND SERVANT, 3.
Construction of workmen's compensation act, see MASTER AND SERVANT, 4.
Priority of assessment liens, see MUNICIPAL CORPORATIONS, 16.
Placing female in house of prostitution, see PROSTITUTION, 1, 2.
Preference right to purchase tide lands, see PUBLIC LANDS.
Apportionment of school funds, see SCHOOLS AND SCHOOL DISTRICTS.

1. STATUTES—TITLES AND SUBJECTS—SUFFICIENCY. The title to the "penal code" (Rem. & Bal. Code, § 2253 *et seq.*), an act "relating to crimes and punishments and the rights and custody of persons accused or convicted of crime," is broad enough to admit of amendments or implied repeals of sections of the former laws relating to criminal procedure; *e. g.*, to embrace Rem. & Bal. Code, § 2316, pro-

STATUTES—CONTINUED.

viding that no order of dismissal or directed verdict of not guilty . . . on the ground of any defect in such indictment or information shall bar another prosecution for the same offense, thereby impliedly repealing § 2113 in the code of criminal procedure on the same subject. *State v. George* 113

2. STATUTES—IMPLIED REPEALS. While repeals by implication are not favored, they are freely admitted where it appears that the legislature intended to cover an entire subject of legislation. *State v. George* 113

3. STATUTES—CONSTRUCTION. While previous constructions of constitutional provisions, adopted from another state, are persuasive, they are not conclusive when not sustained by reason or when based on a misconception of the law. *State ex rel. Brislawn v. Meath*. 302

4. STATUTES—CONSTRUCTION. While a wrongful practice, if long continued, may result in a procedure, it cannot, however long continued, operate to repeal or nullify a constitutional mandate. *State ex rel. Brislawn v. Meath* 302

5. STATUTES—TIME OF TAKING EFFECT—EMERGENCY CLAUSE. Laws 1915, p. 19, § 1, amending Rem. & Bal. Code, § 6605, relating to the personnel of the board of state land commissioners, and substituting for the appointive state tax commissioners and fire warden, the elective secretary of state and state treasurer, is not an act that is necessary for the immediate preservation of the public peace, safety or the support of state government, within the initiative and referendum amendment to the state constitution providing that such laws are not subject to the referendum; hence § 2 of the act, declaring such fact and providing that the act shall take effect immediately is unconstitutional. *State ex rel. Brislawn v. Meath* 302

STENOGRAPHERS:

Act authorizing appointment of official court stenographers as class legislation, see CONSTITUTIONAL LAW, 5.

STIPULATIONS:

Consent to judgment, see JUDGMENT, 5, 6.

STOCK FOOD:

Act regulating sale of as class legislation, see CONSTITUTIONAL LAW, 2-4.

STREAMS:

Title to beds, see WATERS AND WATER COURSES, 4, 5.

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS, 20-22.

STRIKING:

Matter previously waived, see PLEADING, 2.
New matter in reply, see PLEADING, 3.

SUBMISSION:

Of bond issue to vote, see MUNICIPAL CORPORATIONS, 27.

SUBROGATION:

Of agent to rights of company in premiums, see INSURANCE, 5.

SUBSCRIPTIONS:

1. SUBSCRIPTIONS—LIABILITY—CHANGE OF PLAN. A subscriber for a building fund for the erection of a Y. M. C. A. building, planned to cost $35,000 but which in fact cost $66,295, cannot, on that ground, escape liability, when the only condition attached to the subscription was that $25,000 should be raised before a certain date and that condition was fully met; the enlargement of the scope and purpose of the beneficiary and the increase in the subscription fund constituting no detriment to defendant. *Young Men's Christian Association of Wenatchee v. Olds Co*..... 630

2. SAME. Where a subscriber to a building fund permits work on the construction of the building to be carried on for a length of time, he will be regarded as acquiescing in a change of plans whereby its cost was greater than originally contemplated, and cannot urge that fact as relieving him of liability. *Young Men's Christian Association of Wenatchee v. Olds Co*..... 630

SUPERSEDEAS:

On appeal from order adjudging contempt for failure to pay alimony, liability of sureties, see DIVORCE, 13.

SUPPORT:

Custody and support of child on divorce of parents, see DIVORCE, 1, 6, 9, 11.

SURFACE WATERS:

See WATERS AND WATER COURSES, 1.

SURPRISE:

Ground for new trial, see NEW TRIAL, 4.

SWAMP LANDS:

See WATERS AND WATER COURSES, 3.

TAXATION:

Payment of taxes to sustain adverse possession, see ADVERSE POSSESSION, 2.
Assessment for public improvement, see MUNICIPAL CORPORATIONS, 15.

TAXATION—CONTINUED.

Covenants as to payment of taxes by vendee, see VENDOR AND PURCHASER, 2.

1. TAXATION—CONSTITUTIONAL PROVISIONS—EQUALITY AND UNIFORMITY—DUE PROCESS. The assessment of railroad property as an organized entity, including certain elements of intangible value inhering therein, while the general mass of business property has been assessed on the basis of the value of each parcel of real and item of personal property separately considered, is not a violation of the rule of uniformity required by art. 7 of the state constitution; nor is it in violation of art. 14 of amendments to the Federal constitution as to due process and equal protection of the laws. *Northern Pac. R. Co. v. State*..... 510

2. SAME. The assessment of railway operating property as a unit by the state board of tax commissioners instead of by the county assessors as other property is assessed under the general revenue laws, does not violate art. 7, § 3, of the state constitution that taxes on corporation property shall be assessed and levied as near as may be by the same methods employed for individual property, so long as corporate property is charged the same rate of levy and its assessed value measured by the same standard as other property within the state. *Northern Pac. R. Co. v. State*..... 510

3. TAXATION — ASSESSMENTS — DOUBLE TAXATION — ACTIONS — CONDITIONS PRECEDENT—PAYMENT OF TAX. While relief in equity against double taxation is not available unless the payment of one tax is shown, the tax receipts for taxes assessed against certain real estate for specified years shows the payment of one tax on the land including the improvements thereon; under the assumption that the assessor performed his duty of including the improvements as required by Rem. & Bal. Code, § 9102. *Hammond Lumber Co. v. Cowlitz County*..... 462

4. SAME—IMPROVEMENTS—LOGGING ROAD — DOUBLE TAXATION — REASSESSMENT OF OMITTED PROPERTY—VALUATION BY ASSESSOR—CONCLUSIVENESS. A logging railroad not used as a common carrier, and not occupying any separate and distinct right of way outside of the land upon which it was used for logging purposes, constitutes either real estate or improvements on real estate; and an assessment of the real estate is presumed to include the logging road, on the theory that the assessor has done his duty, under Rem. & Bal. Code, § 9102, requiring him in assessing real property to include "the value of all improvements and structures thereon;" hence, after payment of such real estate tax, the subsequent assessment of the logging road (as property omitted from taxation) will be cancelled as double taxation. *Hammond Lumber Co. v. Cowlitz County*..... 462

5. TAXATION—RAILROADS — VALUATION — ELEMENTS — INTANGIBLE INTERESTS—ASSESSMENTS—UNIFORMITY—STATUTES. Under Rem. & Bal.

TAXATION—CONTINUED.

Code, §§ 9141 and 9148, providing that the state board of tax commissioners, in valuing, for the purposes of assessment, all the operating and other real and personal property of a railroad company, shall consider the value of the entire system and of the part within the state, together with such facts as will enable a substantially correct determination of its assessment value to be had, subject to revision by the state board of equalization, and under 3 Id., § 8626-92, providing that, when the public service commission shall have valued the property of any company, nothing less than the market value as found shall be taken as the true value of property used for public convenience for the purposes of taxation, the assessing officers, after determining the cost of reproduction of a railroad's property to be $109,267,908, and the actual cash market value to be $98,016,646, may further take into consideration the density of traffic and volume of business along the company's lines in this state, the nature of the country through which it runs, its facilities for transacting railroad business owned and operated by private individuals, such as warehouses and docks, the price at which it purchases its fuel supply by reason of the location of coal mines, and the resources and development and population of the adjacent country, and having determined the value of such elements to be $12,291,805, may add the same to the previously found valuation; and such action is not unauthorized or discriminatory as an assessment of the company's "good-will," not assessed against other concerns, nor would it be the application of an unlawful measure of value by a different standard than that applied by the county assessors to the property of other concerns; since it includes, rather, that intangible element which enters into and enhances the value of real property by reason of its location, its peculiar adaptability to particular uses, inseparable from the physical property itself, and constituting a substantial portion of the value of the operating property and of the road as a whole. *Northern Pac. R. Co. v. State* 510

6. TAXATION—RAILROADS—VALUATION OF PROPERTY—INTANGIBLE ELEMENTS. The intangible value inhering to railroad operating property, arising from density of traffic and volume of business along the line, the nature of the country through which the line runs, the facilities for transacting railroad business owned and operated by private individuals, the price of its fuel supply, the resources of the country adjacent to the line, and the density of the population living contiguous thereto, is not the same as the personal element of "good-will" which attaches to business concerns conducted by private parties, but these elements add to the value of the property the same as locality may give enhanced value to real estate. *Northern Pac. R. Co. v. State* 510

7. TAXATION—ASSESSMENT — METHOD — CHANGE IN LAW. Where all the valuations for the assessment of property for the current year

TAXATION—CONTINUED.

were completed in May, on the standard of the "market value" of the property, a change of the law going into effect in June, requiring property to be assessed on the basis of one-half of its value, does not affect the assessment for the current year, or authorize the board of equalization, at its sessions subsequent to the going into effect of the new law, to deviate from the standard of valuation in effect at the time the assessments were made. *Northern Pac. R. Co. v. State* 510

8. TAXATION—ASSESSMENT—EXCESSIVE VALUATION. In the absence of a showing of actual fraud on the part of the taxing officers, courts ought not to interfere with an assessment charged as being excessive, where the difference between the assessed value and the alleged actual value is less than ten per cent. *Northern Pac. R. Co. v. State* 510

9. TAXATION—ASSESSMENTS—VALUATIONS — REVIEW. The assessor's valuation for the purpose of taxation will not be disturbed in the absence of evidence to show fraudulent, arbitrary or capricious action. *Hammond Lumber Co. v. Cowlitz County* 462

TENDER:

Of purchase price as condition precedent to relief, see SPECIFIC PERFORMANCE, 2.

Of payments due on land contract, see VENDOR AND PURCHASER, 3, 4.

TERM:

Of leases, see LANDLORD AND TENANT, 1.

THREATS:

As contributing to false imprisonment, see FALSE IMPRISONMENT, 3.

TIDE LANDS:

Title by adverse possession, see ADVERSE POSSESSION, 1.

Preference right to purchase, see PUBLIC LANDS.

TIME:

For objections to account rendered, see ACCOUNT STATED, 3.

For appeal, coparties, see APPEAL AND ERROR, 8.

For filing bond on appeal, see APPEAL AND ERROR, 9.

To apply for writ of review, see CERTIORARI.

For taking effect of legislative act, emergency clause, see CONSTITUTIONAL LAW, 1.

For filing declaration of homestead, see HOMESTEAD.

For motion for judgment *non obstante*, see JUDGMENT, 2.

For objection to defect of parties plaintiff, see PARTIES.

For filing claim against bond to secure performance of state contract, see STATES, 1.

For law to take effect, see STATUTES, 5.

TITLE:

Color of title, see ADVERSE POSSESSION, 2.
Right to question title to real estate held by alien, see ALIENS.
Vesting title in agent for purpose of sale, see PRINCIPAL AND AGENT, 2.
When passes on sale of goods, see SALES, 5.
Statutes, see STATUTES, 1.
To beds of streams, see WATERS AND WATER COURSES, 4, 5.

TORTS:

See FRAUD; LIBEL AND SLANDER; MALICIOUS PROSECUTION; NEGLIGENCE.
Liability of wife for torts of husband, see HUSBAND AND WIFE.
Of employers, see MASTER AND SERVANT.
Malpractice, see PHYSICIANS AND SURGEONS, 3.

TRANSCRIPTS:

Of record for purpose of review, see APPEAL AND ERROR, 11.

TRESPASS:

To the person, see FALSE IMPRISONMENT.

TRIAL:

See NEW TRIAL.
Exceptions or objections for purpose of review, see APPEAL AND ERROR, 4-6, 14.
Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 11.
Presumption of prejudice from instructing jury, see APPEAL AND ERROR, 17.
Review of verdicts, see APPEAL AND ERROR, 20-23.
Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 27-32.
Construction of contract as question for jury, see CONTRACTS, 2.
Of criminal prosecution, see CRIMINAL LAW.
Condemnation proceedings, see EMINENT DOMAIN.
Instructions in action for false representations, see FRAUD, 1.
Instructions in action for slander, see LIBEL AND SLANDER, 2, 3.
Instructions in action on contract for local improvement, see MUNICIPAL CORPORATIONS, 7.

1. TRIAL—IMPROPER ARGUMENT OF COUNSEL. A remark by counsel in arguing to the jury that the attorneys on the other side dare not open up their client's record "since he came back from prison," while improper, was cured by the court's instruction to the jury to disregard the remark, the argument not being evidence, and that it was the duty of the jury to exercise the same degree of fairness and impartiality that they would expect from the court, if they as indi-

TRIAL—CONTINUED.

viduals were submitting their cases to the court. *Bunck v. McAulay* 473

2. TRIAL—INSTRUCTIONS—COMMENT ON THE FACTS—WITHDRAWAL OF ISSUES. A charge to the jury stating that "defendants having made no counterclaim or charge," and withdrawing certain evidence thereon, etc., is not prejudicial as a comment on the facts or as withdrawing from the jury defendants' counterclaim or offset, when in fact no counterclaim was pleaded. *Bunck v. McAulay*..... 473

3. TRIAL — INSTRUCTIONS — "PREPONDERANCE" OF EVIDENCE. An instruction that by the preponderance of the evidence is not meant the greater number of witnesses, but that evidence which, impartially considered, produces the strongest impression and has the greatest weight and is more convincing as to its truth than the testimony opposed to it, is proper. *Yamamoto v. Puget Sound Lumber Co.* 411

4. TRIAL—PROVINCE OF COURT AND JURY—BILLS AND NOTES—HOLDER IN DUE COURSE. Although the burden of proof is upon the owner of a negotiable instrument, if the title is shown to be defective, to prove that he, or some person under whom he claims, acquired title as a holder in due course, it is not error to withdraw the question from the jury and determine it as a matter of law, when the evidence is so clear and convincing that reasonable minds can draw but one conclusion therefrom. *McLaughlin v. Dopps*..... 442

5. TRIAL—GENERAL VERDICT—SEVERAL CAUSES OF ACTION. In an action upon several assigned causes of action, a general verdict in a lump sum may be returned, under Rem. & Bal. Code, §§ 362, 364, where all the causes are submitted to the jury. *Yamamoto v. Puget Sound Lumber Co.* 411

6. TRIAL—BY COURT—FINDINGS OF FACT. In an action for personal injuries, tried to the court, in which the court stated that the case should be submitted on the facts, and overruled a motion for nonsuit and denied a challenge to the sufficiency of the evidence at the close of the case, and held that the plaintiff could not recover on account of contributory negligence, the decision was one on the facts. *Laughlin v. Seattle Taxicab & Transfer Co*..... 342

TRUSTS:

1. TRUSTS—EXPRESS TRUSTS—CONTRACT—CONSTRUCTION. An agreement whereby a husband deeded a one-half community interest to his wife in consideration of which she agreed to execute a will to protect the husband "for one-half interest in all real estate . . . or money she may die possessed of," does not charge the land with an express trust; but leaves her free to dispose of it in any manner, and only affects property of which she may be possessed at the time of her death. *Carman v. Carman*..... 402

UNIFORMITY:

Of tax, see TAXATION, 1, 2, 5.

VACATION:

See JUDGMENT, 1, 7, 8.
Decree awarding alimony, see DIVORCE, 8.
Of partition sale, see JUDICIAL SALES, 2, 3.

VALUE:

Of property in replevin, see REPLEVIN.
Necessity of alleging value of property taken, see ROBBERY.
Valuation of property for taxation, see TAXATION.

VENDOR AND PURCHASER:

Liability of broker for refund of money to purchaser, see BROKERS.
Purchasers at sale on execution, see EXECUTION.
Purchasers at partition sale, see JUDICIAL SALES.
Purchasers of public lands, see PUBLIC LANDS.
Transfer of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE.
Title of purchaser to bed of stream, see WATERS AND WATER COURSES, 5.

1. VENDOR AND PURCHASER—CONTRACTS—CONSTRUCTION—DEED IN ESCROW—COVENANTS—EFFECT. An informal contract for the sale of land, calling for an abstract of title, showing title unincumbered, does not modify or control the construction of the subsequent formal contract of sale providing that a warranty deed therefor should be placed in escrow and that the grantee shall pay all assessments levied in the year 1910; and the vendee is not entitled to take advantage of the covenants of warranty of the deed in escrow before delivery and full performance of the contract terms as to payment of the purchase price, although compelled to pay assessments on the property levied in 1910, which constituted a lien prior to the contract of sale. *Colby v. Keene*..... 185

2. SAME—COVENANTS AGAINST INCUMBRANCES—TAXES AND ASSESSMENTS—SPECIAL COVENANTS AS TO PAYMENT. Under a contract of sale providing that the real estate is free and clear of all incumbrances, but specially stipulating that the vendee shall pay all taxes and assessments for the year 1910, the vendee is liable for the assessments of that year, although a lien at the date of contract, under the rule that, where there is a general covenant in a deed or contract against incumbrances and a special covenant not in harmony therewith, the special covenant will prevail. *Colby v. Keene* 185

3. VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—TENDER—SUFFICIENCY. The deposit of money to meet payments due on a land contract is not a sufficient tender, where no notice of the deposit was

VENDOR AND PURCHASER—CONTINUED.

given and the deposit was not made to the credit of the adverse party. *Boger v. Bell*..... 131

4. SAME — CONTRACT — DEFAULT — FORFEITURE. After notice of forfeiture of a contract for the sale of land for default in payments, the vendee cannot reinstate the contract by a tender, or assert that tender was unnecessary because it appears that it would have been futile. *Boger v. Bell*..... 131

5. SAME—CONTRACT—FORFEITURE—WAIVER. The granting of one extension for a definite time for the payment of the first installment upon a contract for the sale of land does not waive the covenant that time is of the essence of the contract, or prevent a forfeiture after a fair opportunity was offered to meet the contract. *Boger v. Bell* 131

VERDICT:

Review on appeal, see APPEAL AND ERROR, 20-23.
Errors cured by verdict, see APPEAL AND ERROR, 31.
Judgment *non obstante*, see JUDGMENT, 2.
General verdict upon assigned causes of action, see TRIAL, 5.

VESTED RIGHTS:

Equal protection of laws, see CONSTITUTIONAL LAW, 2-5.

VOTERS:

Submission of bond issue to, see MUNICIPAL CORPORATIONS, 27.

WAIVER:

Error waived in appellate court, see APPEAL AND ERROR, 3, 4.
Of plea of former jeopardy, see CRIMINAL LAW, 6.
Of rights by riparian owner, see EMINENT DOMAIN, 5.
Of defenses by insurance company, see INSURANCE, 3, 4.
Of proof by entry of judgment by consent, see JUDGMENT, 6.
Defect of parties, see PARTIES.
Of right to rescind contract, see SALES, 3.
Of default by vendee in conditional sale contract, see SALES, 10.
Of right to declare forfeiture for default in payments, see VENDOR AND PURCHASER, 5.

WARRANTY:

As to plans for improvement, see MUNICIPAL CORPORATIONS, 4.
Covenants of in deed, see VENDOR AND PURCHASER, 1, 2.

WATERS AND WATER COURSES:

Condemnation by city for water system, see EMINENT DOMAIN, 1, 2, 8, 9.
As boundary of highway, see HIGHWAYS, 1.
Indebtedness for purchase of water system, see MUNICIPAL CORPORATIONS, 23-27.

WATERS AND WATER COURSES—CONTINUED.

1. WATERS AND WATER COURSES—WHAT CONSTITUTES—STREAMS OR SURFACE WATER—EVIDENCE—SUFFICIENCY. In an action for damages for the obstruction of waters, causing an overflow of adjoining lands, a finding that the same was a water course, and not surface waters, is sustained where it appears that living and flowing waters from a gulch to the east flow or move to the westward in all seasons and under all conditions, spreading out over and crossing plaintiff's low lands by natural gravitation and finding their way into a water course to the west of plaintiff's lands, which were agricultural lands and easily made dry and fit for cultivation by surface ditches converging toward such water course. *Miller v. Eastern R. & Lumber Co.* 31

2. SAME—SPREADING WATERS. In such a case, if the same was not a water course within the common definition of the term, it is a water course in the sense that there is a natural gravitation of living, flowing waters which one proprietor cannot arrest to the damage of his neighbor. *Miller v. Eastern R. & Lumber Co.*..... 31

3. SAME—SWAMP LANDS. In such a case, the plaintiff's land was not swamp land, but natural soil over which a water course has spread itself, and the owner had a right to direct the waters in surface ditches over his land. *Miller v. Eastern R. & Lumber Co...* 31

4. WATERS AND WATER COURSES — BEDS OF STREAMS — OWNERSHIP — NAVIGABILITY. Where a stream is navigable only for the purpose of floating logs and shingle bolts, and not in the general commercial sense, the title to the bed of the stream is in the owner of the adjacent land, as far as the thread of the stream, and not in the state, under Const., art. 17, § 1, asserting the state's title to the beds and shores of all "navigable" streams. *State ex rel. Davis v. Superior Court* 252

5. SAME — BEDS OF STREAMS — OWNERSHIP — BOUNDARIES — RIVERS. Where land was purchased according to a plat describing the tract as running "to the Coweman slough, thence with the meanders of said slough" by courses and distances, "thence leaving the slough . . . to the point of beginning," the purchaser acquires title to the bed of such slough, under the rule that, where the description in a plat makes a nonnavigable stream a boundary, the boundary line is the thread of the stream and not the bank, unless a contrary intention appears from the language used in the description, and by the further rule that courses and distances must yield to natural and ascertained objects, such as a river or slough; and the "meanders" of the slough must mean a line following the sinuosities of the river. *State ex rel. Davis v. Superior Court*..... 252

6. SAME—RIPARIAN OWNERS—RIGHT TO ACCUSTOMED FLOW. Where a boundary extends over the bank and into the river, the owner is a

WATERS AND WATER COURSES—CONTINUED.

riparian owner, and entitled to damages for deprivation of the right to the natural flow of the stream in its accustomed channels without diminution or alteration, subject to the same right as other riparian owners. *State ex rel. Davis v. Superior Court*..... 252

7. WATERS AND WATER COURSES—POLLUTION—RIPARIAN RIGHTS—DOMESTIC USE. An upper riparian owner, a coal mining company, has no right to use the waters of a stream for washing coal and turn the water back into the stream polluted with foreign substances rendering it unfit for domestic and farm purposes, thereby causing substantial damages to a lower riparian owner entitled to the use of the stream in its natural purity for agricultural and domestic purposes and watering stock. *Packwood v. Mendota Coal & Coke Co.* 47

WHARVES:

As approach to ferry operated by county, see FERRIES.

1. WHARVES—PUBLIC WHARVES—USE FOR FERRY. A county's use of a wharf and approaches for a ferry, under a grant from the state, in its proprietary capacity as licensee of the state, does not make the wharf and approaches a public dock. *Anderson Steamboat Co. v. King County* 375

2. WHARVES—PUBLIC WHARVES—PRESUMPTION. Where a wharf is used in a proprietary capacity as an approach to a county ferry, and the wharf is constructed on state lands to connect with a public highway running along the shore, opposite to an intersecting state highway terminating in but not extending beyond the shore road, there is no presumption of a common right of user, and the wharf is not a public wharf. *Anderson Steamboat Co. v. King County*. 375

3. SAME—PUBLIC CHARACTER—USE OF PUBLIC FUNDS. The public character of such a wharf and ferry approach cannot be determined by reference to the fact that the county has paid for it and its upkeep from the road and bridge fund; since an unlawful diversion of county funds does not affect the character of the county's ownership and use of the wharf and ferry approach. *Anderson Steamboat Co. v. King County*..... 375

WITNESSES:

See DEPOSITIONS.
Mileage and fees as costs, see COSTS.
Failure of accused to testify in own behalf, see CRIMINAL LAW, 7.

1. WITNESSES—COMPETENCY—DIVORCED SPOUSES. Under Rem. & Bal. Code, § 1214, providing that neither spouse shall be a witness for or against the other without the latter's consent, "nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage," a divorced wife is a competent witness against her

WITNESSES—CONTINUED.

former husband as to acts and facts occurring during the marriage relation, when her testimony does not involve communications made by him to her arising from the confidence induced by such relation; hence a wife, after divorce, may testify as to facts corroborating a charge of rape committed by the former husband on his stepdaughter. *State v. Snyder* 485

2. WITNESSES — TRANSACTIONS WITH DECEDENT — DELIVERY OF DEED. Under Rem. & Bal. Code, § 1211, providing that, where the adverse party sues or defends as deriving right or title by, through, or from any deceased person, a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with such deceased person, plaintiff, in an action to establish a lost deed, which had been executed to her by a grantor since deceased, cannot testify that, at a certain time and place and in the presence of a certain person, she had received the deed from deceased. *White v. Walker* 652

WORDS AND PHRASES:

"Extra-hazardous employment," see MASTER AND SERVANT, 4.

WORK AND LABOR:

Liens for labor, see MASTER AND SERVANT, 1, 2.
Liens for work and materials, see MECHANICS' LIENS.

1. WORK AND LABOR — PERFORMANCE OF CONTRACT — EVIDENCE—SUFFICIENCY. In an action on contract for clearing land, a finding in defendants' favor was warranted where there was evidence that the original contract was superseded by a supplemental contract agreeing to pay plaintiff a certain sum conditioned on his completing certain work and surrendering the unexpired lease, and that he failed and refused to perform the supplemental contract. *Loudon v. Spencer* 236

2. SAME—CONTRACTS—SUBSTITUTION — QUANTUM MERUIT — DEFENSES. Where plaintiff had agreed to clear land for the use of the same for two years, and after partial performance, brought action upon a subsequent agreement whereby the owner was to pay him $250 for the services performed, and plaintiff's evidence failed to sustain the allegations as to such subsequent contract, he is not entitled to recover on a *quantum meruit* for the work done under the original contract, where it further appeared that the original contract had been waived by the acceptance of a subsequent contract which plaintiff had wholly failed to perform; since the original contract had been rescinded, and *quantum meruit* cannot be awarded upon a total failure to perform the substituted contract. *Loudon v. Spencer* 236

WORKMEN'S COMPENSATION ACT:

See MASTER AND SERVANT, 4, 5.

WRITINGS:

Parol evidence to vary or explain, see EVIDENCE, 3-7.

WRITS:

See CERTIORARI; EXECUTION; HABEAS CORPUS; INJUNCTION; MANDAMUS; PROCESS; PROHIBITION; REPLEVIN.

YEAR:

Term for years, see LANDLORD AND TENANT, 1.